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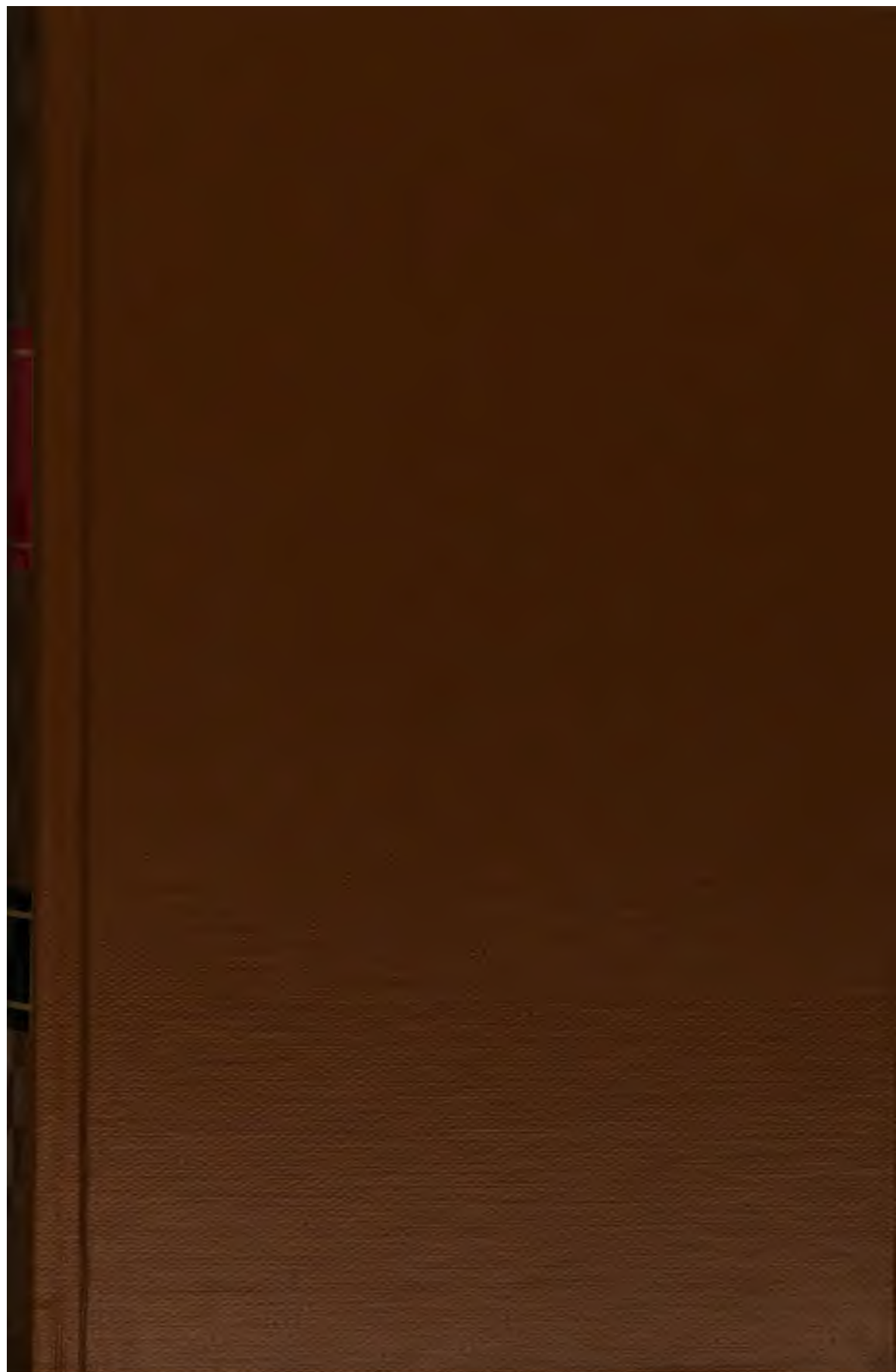
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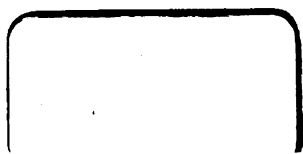
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES ARGUED AND CITED, AND THE PRINCIPAL
MATTERS.

EDITED BY

HON. GEORGE SHARSWOOD.

VOL. LXXXI.

CONTAINING

THE CASES DETERMINED IN EASTER AND TRINITY TERMS AND TRINITY
VACATION, 1855.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

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BY

JOHN SCOTT, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.


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DURING THE PERIOD COMPRISED IN THIS VOLUME.

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The Hon. Sir WILLIAM HENRY MAULE, Knt.
The Hon. Sir CRESSWELL CRESSWELL, Knt.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir RICHARD BUDDEN CROWDER, Knt.

ATTORNEY-GENERAL.
Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.

SOLICITOR-GENERAL.
Sir RICHARD BETHELL, Knt.

A

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
EXCHEQUER CHAMBER,
IN
Easter Term,
IN THE
EIGHTEENTH YEAR OF THE REIGN OF VICTORIA. 1855.

The Judges who usually sat in Banc in this Term were :

JERVIS, C. J.
MAULE, J.

CRESSWELL, J.
WILLIAMS, J.

MEMORANDUM.

IN the Vacation preceding this Term, Humphrey William Woolrych, Esq., of the Inner Temple, was called to the degree of the Coif. He took his seat within the Bar of this Court accordingly on the first day of this Term.

He gave rings with the following motto :—"Leges, juraque."

*2] ***THE EASTERN COUNTIES RAILWAY COMPANY v.
PHILIPSON and Others. April 30.**

By a contract made between the Eastern Counties Railway Company and the defendants, it was, amongst other things, provided, that the defendants should supply and the company should purchase, subject to the terms and to the extent thereafter mentioned, *all* the coke that should be required by the company for working their railways between London and Cambridge and London and Colchester. By the fourth clause, the company engaged to take from the defendants 550 tons and 100 tons of coke weekly during the period of seventeen years; and they further agreed, that, if they should require *more* than those quantities for the working of their railways, they would take the same from the defendants,—with a proviso, that, if they should require *less* than the stipulated quantities, the supply should be reduced accordingly, upon their giving the defendants three months' notice. And, by the eleventh clause, the company engaged, that, "so long as the defendants should punctually and duly supply *the said coke*, and so long as the same should be of the best quality, they would abstain from making purchases of coke for their lines of railway aforesaid, from any other persons:—"

Held, that the readiness and willingness of the company to take from the defendants *all* the coke they required for the purpose of their railways, was not a condition precedent to their right to insist upon being supplied with the quantities expressly stipulated for; and, consequently, that the fact of the company having bought coke from other persons afforded no answer to an action by them against the defendants for a failure to deliver the quantities contracted for.

THIS was an action for the breach of a contract, under seal, for the supply of coke to the plaintiffs.

The declaration stated, that an indenture was made between the plaintiffs of the first part and the defendants of the second part, to the tenor and effect as in the words and figures following, that is to say,—
"This indenture, made the 13th day of December, 1849, between the within-named Eastern Counties Railway Company of the first part, and the within-named Nicholas Wood, Henry Morton, and Ralph Park Philipson, of the second part: Whereas, it has been agreed between the said parties hereto that the several clauses, stipulations, and agreements contained in the within-written indenture, and also in certain supplemental articles of agreement made between the said parties hereto, dated the 6th of January, 1849, relating to the supply of coke by the said parties of the second part to the said company, shall henceforth be entirely at an end and cancelled; and that certain new stipulations shall be entered into between the said parties hereto as hereinafter
*3] contained: Now, these presents witness, that the said Eastern Counties Railway Company, and the said Nicholas Wood, Henry Morton, and Ralph Park Philipson, do covenant and agree each with the other of them, and as binding their successors, executors, administrators, and assigns,—First, that the payment by the company for coke supplied up to the 1st of April, 1847, shall be stated and considered as settled,—Secondly, that the accounts now remaining unsettled between the said parties hereto for coke supplied to the said railway company from the 1st of April, 1847, to the 1st of April, 1849, shall be forthwith settled by the said Nicholas Wood and partners charging and being allowed for all coke so supplied at Blackwall or Colchester station 25s. per ton if delivered in bulk in wagons, and 25s. 6d. per ton if delivered

in bags; and the balance found due to the said Nicholas Wood and partners upon such settlement of account relating exclusively to the supply of coke, and the charges connected therewith, and the rents and interest payable by the said Nicholas Wood & Co., after making all just allowances between the said parties, having been agreed at the sum of 8480*l.* 4*s.* 9*d.*, the same shall be paid to them in cash by the said railway company, upon the signing of this agreement, without prejudice to any other accounts and reckonings (if any) between the said parties hereto, not forming portion of the accounts upon which such balance has been found due,—Thirdly, that the said Nicholas Wood and partners shall supply, and the said company shall purchase, subject to the terms, and to the extent, hereafter mentioned, all the coke that shall be required by the said company for working the up and down traffic of their lines of railway between London and Cambridge and London and Colchester, and the branches running into the said lines,—such coke to be of the best quality, and the supply thereof to take place at Blackwall and *also at Colchester,—Fourthly, *that the said company engage*, subject to the terms hereafter mentioned, and conditional ^[*4] thereunder, *to take*, and the said Nicholas Wood and partners to supply hereafter, for the term of seventeen years from the 1st day of April last, *550 tons of coke per week at Blackwall, and 100 tons per week at Colchester, at the least. If the company should, however, require more coke for the said working than those quantities, they engage, subject to the terms hereafter mentioned, and conditional thereunder, to take the same from the said Nicholas Wood and partners.* But, in the event of the company's consumption of coke for the said working hereafter being materially diminished, then the said company shall give three months' notice to the said Nicholas Wood and partners to diminish their supplies to certain less quantities per week than the said 550 tons and 100 tons: and, if the company's consumption of coke for the said working shall at any time hereafter be materially diminished, then and thenceforth the said company shall not be bound to take more than the diminished quantities mentioned in the said notice, not being less than the quantity required by the said company for the said working,—Fifthly, that, the first three years of the said term, the price to be paid by the said company for such coke of best quality, shall, delivered in bulk in the wagons, be 24*s.* per ton at Blackwall, and 28*s.* per ton at Colchester station, with such abatement as hereinafter mentioned,—Sixthly, that, from and after the expiration of such term of three years, the price of coke to be supplied to the said company during the then next immediately ensuing term of three years, and to be paid by the said company, shall be the market price for like quantities during the month of April, 1852, of coke of the best quality, to be delivered at Blackwall and Colchester,—Seventhly, that, in the month of April in the years 1855, 1858, and 1861,

*5] respectively, the *price of coke to be supplied for such term of three years thence next ensuing respectively, and to be paid by the said company, shall be in like manner fixed and regulated by the market prices for the quantities prevailing in each such month, of coke of the best quality, to be delivered at Blackwall and Colchester,—Eighthly, that, in the month of April, 1864, the price of coal to be supplied for the last two years of the said term of seventeen years, and to be paid by the said company, shall be in like manner paid and regulated by the market price for like quantities prevailing in such month, of coke of the best quality, to be delivered at Blackwall and Colchester,—Ninthly, that the account for the supplies of coke during the said term of seventeen years shall be stated and settled monthly; and the amount of the invoices for coke delivered, made up according to the said prices, and due to the said Nicholas Wood and partners for each month, shall be paid in cash to them on or before the 20th day of the then succeeding month, subject to a discount or abatement of 2l. 10s. per cent. in consideration of such prompt payment, but to no other deduction in the nature of discount; but the said Nicholas Wood and partners shall pay, for shunting, a charge of 2d. per ton, when the same shall be done by the engines of the said company, and such other terminal charges as the directors may require for the use of any wharfs or sidings belonging to the said company, which, not being rented by the said Nicholas Wood and partners, may be used by them in the course of their business; but such terminal charges shall not exceed those made to other persons for wharfage at the said company's wharfs, or use of their sidings,—Tenthly, that, at the expiration of the contract for twelve months entered into by the said Eastern Counties Railway Company for the supply of coke from Bitchbush and Brancepeth collieries, at Peterborough, the said Nicholas *6] Wood and partners shall, *subject to the terms hereinafter mentioned, and conditional thereon, be at liberty to supply the coke that may be required at that station, at prices not exceeding the rate at which the said company can purchase or supply themselves, at the said station, with coke of a similar quality from other parties,—Eleventhly, and the said Nicholas Wood, Henry Morton, and Ralph Park Philipson covenant and agree with the said company, as a condition precedent to the said company being obliged to take and receive the said supplies of coke, that the same shall always be of the best quality; and, in consideration of the said premises, the said company engage, that, so long as they, the said Nicholas Wood, Henry Morton, and Ralph Park Philipson shall punctually and duly supply the said coke, and so long as the same shall be of the quality last aforesaid, they will abstain from making purchases of coke for their lines of railway aforesaid from any other persons. But it is expressly agreed and understood, that, if there be at any time any deficiency or want of punctuality in the supply of the said coke, the said company may purchase coke elsewhere, to the

extent that may be requisite, during the time of such deficiency or want of punctuality, and, to the extent of their purchases, may decline and refuse coke from the said Nicholas Wood and partners; and so also, that, if the coke supplied by the said Nicholas Wood and partners be not of the best quality as aforesaid, the said company may purchase coke elsewhere, to the extent that may be requisite to replace the coke not of the best quality so supplied as aforesaid, and be requisite to prevent the said company being inconvenienced, injured, or damaged by the continued supply of inferior coke, and, to the extent of their purchases, may decline and refuse coke from the said Nicholas Wood and partners; and that, by so doing, in either case, the said company shall not incur to the said *Nicholas Wood and partners any liability, [*7 loss, costs, damages, and expenses whatsoever: and, in case the said Nicholas Wood and partners shall by their default in any of the respects hereinbefore mentioned compel the said company to obtain supplies of coke elsewhere, they shall be liable to pay, and shall pay, to the said company the loss or extra price they the said company may in each case of purchase of coke elsewhere incur by having had to purchase the same at higher prices than those which under this agreement would, at the times of such purchases, be payable to the said Nicholas Wood and partners by the said company. In witness, &c." Averment, that the plaintiffs had at all times been ready and willing to observe, perform, fulfil, and keep the said indenture on their part, and had always observed, performed, fulfilled, and kept the same on their part, in all things necessary to entitle them to the performance of the same by the defendants, and all things had been done and the necessary times had elapsed, to enable them to sue the defendants for the breaches of covenant thereafter mentioned: That the plaintiffs, after the making of the said indenture, and during the said term of seventeen years, to wit, on the 1st of January, 1854, and during all the time thence until the commencement of this suit, required large quantities of coke for working the up and down traffic of their lines of railway between London and Cambridge and London and Colchester, and the branches running into the said lines, to wit, the whole quantity of 550 tons of coke per week, to be supplied at Blackwall, and 100 tons of coke per week, to be supplied at Colchester, and required the same to be supplied by the defendants at Blackwall and Colchester according to the said indenture,—as the defendants during all the time aforesaid well knew, and whereof they had notice; and, although they were requested by the plaintiffs to supply them, *the plaintiffs, with the coke as required by the plain- [*8 tiffs as aforesaid, to wit, at Blackwall and Colchester, according to the said indenture, and the covenant of the defendants in that behalf; and although the plaintiffs were always ready and willing to purchase, accept, and pay for the coke so required by them, according to the said indenture, and had done all things, and the necessary times had elapsed,

to entitle them to have had the same supplied to them by the defendants at Blackwall and at Colchester, according to the said indenture,— Yet the defendants, during all the time from the 1st of January, 1854, to the commencement of this action, made default in supplying coke to the plaintiffs at Blackwall and Colchester, according to the said indenture, and their covenant in that behalf, and did not nor would, during that time, supply the plaintiffs, at Blackwall and Colchester, or elsewhere, with the coke required by them as aforesaid, or any part thereof, and wholly and absolutely refused to supply the plaintiffs with any coke whatever upon the terms of and according to the said indenture : And, for a second breach of the covenants of the defendants, the plaintiffs further said, that, during the continuance of the said term of seventeen years, and during the said year 1854, and before the commencement of this suit, the defendants did, by their said default in so supplying the said coke as aforesaid, compel the plaintiffs to purchase and obtain, and the plaintiffs did by reason thereof purchase and obtain, some supplies of coke elsewhere, and, by reason of such default of the defendants, the plaintiffs incurred and became liable to pay, and did pay, higher and extra prices for such coke so purchased and obtained elsewhere than those which under the said indenture would at the time of such purchases have become payable to the defendants by the plaintiffs,—of *9] which the defendants also had notice ; yet the defendants, although *requested so to do, and although a reasonable time for that purpose had elapsed before the commencement of this suit, did not nor would pay the said loss or extra prices so by the plaintiffs incurred and paid as aforesaid : That, by reason of such first-mentioned breach of covenant of the defendants, the plaintiffs were unable to procure a sufficient quantity of coke for working the said up and down traffic of their said lines of railway and branches, and could only procure a small and insufficient quantity of coke for that purpose, and had to pay much higher and larger prices for such small and insufficient quantity than the price for which the defendants had so covenanted and agreed to supply the plaintiffs with the said coke ; and, by reason of such default of the defendants, the plaintiffs were obliged to use coal, which was a bad, improper, and insufficient fuel for working the said traffic, and the plaintiffs were forced and compelled to purchase and use large quantities of coal for and about the working of the said traffic of their said railways and branches, and at much higher and larger prices than the price for which the defendants had so covenanted and agreed to supply the plaintiffs with the said coke ; and, by reason of the plaintiffs' being so compelled to use the said coal, being such insufficient and improper fuel as aforesaid, for the working of the said traffic of their said railways and branches, the steam-engines of the plaintiffs became and were thereby much injured and damaged, and the carriages of the plaintiffs were much damaged and injured by the smoke from the said coal, and

otherwise, and the traffic, trains, and carriages of the plaintiffs running over and upon the said railways and branches, and the passengers travelling thereon, were greatly annoyed, inconvenienced, interfered with, impeded, and delayed: and the plaintiffs claimed 50,000*l*.

The defendant Philipson (the other two defendants having allowed judgment to go by default) pleaded, that, *after the making of the said deed, and thence until the said supposed default and [*10 breach of covenant first alleged, the defendants always supplied the plaintiffs, according to the said deed, with as much coke as the plaintiffs required them to supply, and the defendants were during the time aforesaid ready and willing to supply the plaintiffs with coke according to the said deed; and that, during the time aforesaid, the plaintiffs did require more coke for working the said traffic in the said deed mentioned than the quantity which they required the defendants to supply; nevertheless, the plaintiffs gave the defendants no notice to diminish their supplies to any less quantities per week than the said 550 tons and 100 tons in the deed mentioned, nor were the plaintiffs ready and willing to take from the defendants more coke than they the plaintiffs required the defendants to supply, and which the defendants did supply as aforesaid; but the plaintiffs wrongfully and fraudulently took, purchased, and obtained from other persons, for the purpose of working and for working the said traffic, divers large quantities of coke, without the knowledge, consent, or permission of the defendants, to the great loss of the defendants, and contrary to the plaintiffs' said covenant in that behalf; wherefore the defendants did, on discovering and ascertaining the said premises, refuse to supply the plaintiffs with any more coke, as in the said declaration alleged, and which was the said supposed breach first alleged.

The plaintiffs joined issue on the above plea, and also demurred,—the ground alleged in the margin being, “that the matters alleged in the plea afford no answer to the plaintiffs' claim.”

Kaye, in support of the demurrer.—The plea is bad: it amounts to no more than this, that, because the plaintiffs did not take from the defendants *all* the coke they *required for the working of their rail- [*11 ways, the latter were absolved from the obligation to perform their covenant to deliver the quantities absolutely and definitively stipulated for. The plea assumes that the company's unwillingness to take all their supply from the defendants is a condition precedent to the obligation on the defendants' part to deliver any coke. That clearly is a fallacy. On the contrary, the supplying the stipulated quantities with punctuality by the defendants, is expressly made a condition precedent to the obligation on the plaintiffs' part to accept the coke. All the cases upon the subject, from *Boone v. Eyre*, 1 H. Blac. 254, to the present time,—all of which are referred to in the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 *b*,—show, that, whether the stipu-

lations on the one side are to be construed as conditions precedent to those on the other, or as independent covenants, is in all cases a question of intention, to be collected from the whole of the instrument: and here the deed shows not the smallest indication of intention such as that which must be contended for on the other side to make this plea good. [JERVIS, C. J.—The plea in effect amounts to this, that, because the company have not taken from the defendants *all* the coke they required for the working of their railways, the defendants are justified in refusing to let them have any. I think we must hear what can be said in support of the plea.]

Manisty, contra.—The contract in question was to extend over a period of seventeen years. The third clause of it provides that the defendants shall supply and the company shall purchase, subject to the terms and to the extent thereafter mentioned, *all* the coke that should be required by the company for working their railways between London and Cambridge and London and Colchester. By the fourth clause, the *12] company engage to *take from the defendants 550 tons and 100 tons of coke weekly during the seventeen years; and they further agree, that, if they should require *more* than those quantities for the working of their railways, they will take the same from the defendants,—with a proviso, that, if they should require *less* than the stipulated quantities, the supply should be reduced accordingly, upon their giving the defendants three months' notice. And, by the eleventh clause, the company engage, that, "so long as the defendants shall punctually and duly supply *the said coke*, and so long as the same shall be of the best quality, they will abstain from making purchases of coke for their lines of railway aforesaid from any other persons." The plea alleges that the plaintiffs refused to take the coke which the defendants were ready and willing to supply, and, requiring more for the working of their railway than they required the defendants to deliver, wrongfully and fraudulently purchased coke for that purpose from other persons. Their readiness and willingness to take the *whole* supply required for the working of their railways, was, it is submitted, a condition precedent to the right on the part of the company to demand any. [CRESWELL, J.—More than the 550 tons and 100 tons?] Yes. [WILLIAMS, J.—Do you contend, that, if the company are guilty of a breach of their covenant, by getting coke elsewhere, the defendants' covenant to supply the stipulated quantities is gone for ever?] It is submitted that it is, provided the breach on the company's part is wilful; that is, provided they made their purchases elsewhere, when they might have obtained the coke from the defendants.

JERVIS, C. J.—It may be that the company have been guilty of a substantive breach of the contract on their part. But the performance of the covenants by them is not a condition precedent to their right to

sue for a *breach of covenant on the part of the defendants. The consequences that would result from the construction contended [*13 for by Mr. *Manisty* are so serious, that I think we are bound to hold these to be independent covenants.

The rest of the Court concurring, Judgment for the plaintiffs.

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BUTCHER v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY. *April 26.*

The plaintiff, a passenger by railway, brought with him into the carriage a carpet-bag containing a large sum of money, and kept it in his own possession until the arrival of the train at the London terminus. On alighting from the carriage with the bag in his hand, the plaintiff permitted a porter of the company to take it from him for the purpose of securing for him a cab. The porter, having found a cab (within the station), placed the carpet-bag on the footboard thereof, and then returned to the platform to get some other luggage belonging to the plaintiff, when the cab disappeared, and the carpet-bag and its contents were lost:—Held, that this was a loss by the negligence of the company, for which they were responsible in damages.

THIS was an action against the London and South-Western Railway Company for the loss of a carpet bag containing money.

The first count of the declaration stated, that, the defendants being common carriers for hire of passengers and their luggage, goods, and chattels on their railway, the plaintiff, to wit, on the 9th of May, 1854, at the request of the defendants, became and was a passenger on a journey upon and along their said railway; and the defendants, as such common carriers, then received the plaintiff as such passenger into one of their carriages upon their said railway, and divers goods and chattels, to wit, his carpet-bag and its contents, being the luggage, goods, and chattels of the plaintiff, of great value, to be safely and securely kept, carried, and conveyed by the defendants as such carriers as aforesaid, and, at the end of his said journey, to wit, in London, to *be [*14 safely and securely delivered up by the defendants, as such carriers, to the plaintiff, for reasonable reward to the defendants in that behalf: yet the defendants did not safely and securely keep, carry, convey, and deliver the said goods and chattels, although the said journey had ended, and a reasonable time for their carrying, conveying, and delivering the same had ended and elapsed, before this suit; and by reason of the carelessness, negligence, and improper conduct of the defendants in the premises, and not otherwise, the said goods and chattels became and were wholly lost to the plaintiff.

The second count stated that the plaintiff, at the request of the defendants, delivered to the defendants, who then received of the plaintiff, certain goods and chattels to be by them safely and securely kept, carried, and conveyed for, and to be afterwards upon request delivered to the plaintiff; yet the defendants did not use due and proper care in and

about the keeping, carriage, conveyance, and delivery of the said goods and chattels, and thereby, and not otherwise, the same became and were wholly lost, and never had been delivered to the plaintiff, although the plaintiff requested the defendants to deliver the same to him, and although a reasonable time for that purpose had afterwards, and before this suit, elapsed, and the defendants ought before suit to have delivered the same to him.

The third count stated that the plaintiff, at the defendants' request, delivered to them certain goods and chattels, to be by them safely and securely kept, taken care of, and deposited in a place of safety for the plaintiffs; and the defendants then accepted and took into their possession and custody the same goods and chattels for the purpose last aforesaid, but did not use due and proper care in and about the keeping, taking care of, and depositing of the same goods and chattels in a place
*15] of safety for the plaintiff; whereby and by reason of the *negligence, carelessness, and default of the defendants in that behalf, the same goods and chattels were lost to him.

There was also a count charging a conversion.

The defendants pleaded, amongst other pleas, not guilty, and, to each of the first three counts, that they did not receive the said carpet-bag and its contents for the purposes therein respectively mentioned. Issue thereon.

The cause was tried before Maule, J., at the last assizes at Kingston, when the following facts appeared in evidence:—The plaintiff and his wife, on the 9th of May last, were passengers by the defendants' railway, travelling from Farnham to London, having with them a carpet-bag containing, besides wearing apparel, money to the amount of 400*l.*, and also a box or trunk. On the arrival of the train at the Waterloo Road Station, the plaintiff alighted from the railway carriage with the carpet-bag (which he had taken into the carriage with him and kept on his knee throughout the journey), and, leaving his wife with the trunk, which he had procured from the luggage-van, he was proceeding to look for a cab, when a man in the employ of the company (as a lamp-cleaner, as it afterwards appeared), finding that the plaintiff had been unsuccessful in his search for a cab, offered to obtain one for him, and took the carpet-bag from the plaintiff's hand, and (the plaintiff following him as closely as he could), crossing one or two ranks of vehicles which were all engaged, placed the bag on the foot-board of a cab at some little distance from the edge of the platform, but still within the company's station, for the purpose, as he said, of securing the cab (such being, it appeared, the course usually adopted at railway stations, by porters and others, for that purpose), and then returned for the purpose of fetching the trunk; but, on going back to the spot where the cab had
*16] stood, *neither cab nor carpet-bag were to be seen, nor was either.
of them afterwards discovered.

On the part of the plaintiff, reliance was placed upon *Richards v. The London, Brighton, and South Coast Railway Company*, 7 C. B. 839 (E. C. L. R. vol. 62), 6 Railway Cases, 49, as being exactly in point.

For the defendants, it was submitted that there was no evidence that the carpet-bag in question had ever been delivered to the company at all to be carried; and that, even assuming that it had, the company had completed their contract when the plaintiff alighted with the carpet-bag in his possession at the London terminus, and where, having it entirely under his own control, it was perfectly optional with him to keep it or to intrust it to the care of somebody else: and it was sought to distinguish the case of *Richards v. The London, Brighton, and South Coast Railway Company* on the ground that there the dressing-case had never in point of fact been delivered by the company to the plaintiff.

The learned judge inclined to think the company were not liable for the loss. He, however,—nothing being left to the jury,—directed a verdict to be entered for the plaintiff, for 400*l.*, reserving leave to the defendants to move to enter a nonsuit, if the court should be of opinion that there was no case to go to the jury.

E. James, on a former day in this term, obtained a rule nisi accordingly.

Montagu Chambers and *Lush* now showed cause.—The company's servant clearly was guilty of negligence and breach of duty in placing the carpet-bag on the foot-board of the cab, without watching it. The duty which a railway company owes to a passenger is not at an end until the passenger with his luggage is safely *out of the station. So long as the luggage is being interfered with by a servant of the company, the transit is continuing. [JERVIS, C. J.—Is there any obligation imposed by law upon the company to cause a passenger's luggage to be placed in or upon a cab?] Allowing none but their own servants in any way to meddle with the luggage of passengers, they are responsible for the acts and omissions of those whom they employ, and are bound at the end of the journey to put the luggage safely in the hands of the passenger or into those of his appointed agent or servant. [JERVIS, C. J.—The customary mode of delivery must be engrafted upon the railway contract. WILLIAMS, J.—What did the plaintiff intend the porter to do with his carpet-bag when he allowed him to take it from his hand? The porter surely was guilty of no negligence if he did what the plaintiff tacitly ordered or allowed him to do.] Clearly not. But he had no right to place the bag on a cab and there leave it and come away without having the means of identifying the vehicle. In *Richards v. The London, Brighton, and South Coast Railway Company*, 7 C. B. 839 (E. C. L. R. vol. 62), 6 Railway Cases, 49, this court distinctly laid it down, that, where a railway company employ porters at their stations to convey passengers' luggage

from the railway carriages to the carriages or hired vehicles of the passengers, the liability of the company as carriers continues until the porters have discharged their duty. The facts of that case were these,—The plaintiff's wife, accompanied by a female servant, took places for London in a first-class carriage on the defendants' railway, at the Woodgate Station, near Bognor, bringing with them a considerable quantity of luggage, which was weighed, and the excess beyond the quantity allowed to first-class passengers paid for. On their arrival at the terminus at London Bridge, the lady, who was an invalid, was assisted to *18] a hackney coach, into and upon which the luggage *was placed by certain servants of the company, who, upon the maid attempting to remove the small articles from the railway carriage to the coach, desired her not to trouble herself, as they (the porters) would see to the luggage. Upon reaching the residence of the plaintiff, it was for the first time discovered that part of the luggage, viz. a dressing-case, containing trinkets and jewellery, which had been placed by the driver of the fly which conveyed the plaintiff's wife and her servant from Bognor to the Woodgate Station, under the seat of the railway carriage, was missing; and, notwithstanding the most searching inquiry, no trace of it could be discovered. And it was held, that these facts entitled the plaintiff to a verdict upon a count charging them with negligence in the carriage, conveyance, and delivery of the passenger with her luggage. Wilde, C. J., in giving judgment, said: "The duty of common carriers, by the common law, is perfectly well understood: it is a warranty safely and securely to carry; whether they be guilty of negligence or not is immaterial; the warranty is broken by the non-conveyance or non-delivery of the goods intrusted to them. The result upon the first count here, is, that the plaintiff's wife was received by the company as a passenger, to be carried with her luggage from Woodgate Station, and safely and securely delivered at the terminus in London; and that, by the improper conduct of the servants of the company, a part of the luggage was never delivered. Does that disclose a good cause of action? I am of opinion that it does, and that the defendants have shown nothing which in point of law releases them from the general obligation which the law casts upon them. On the part of the defendants, it was contended that the goods *were* carried. But the allegation is, that they were received by the company to be carried and conveyed *and delivered* at the terminus in London; and they were not *delivered*. I think it *19] was clearly established *that the dressing-case was delivered to the company. The facts are simple. The lady comes to the station in a fly. The dressing-case is put into the carriage, to be conveyed to London with her. Nothing is more common. No doubt, this might have been done under such circumstances as would discharge the carriers, or, more properly speaking, under such circumstances as never to cast upon them the responsibility of carriers. But that would depend

upon the evidence. The fact of the dressing-case having been placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion makes no difference." And Cresswell, J., said: "There was abundant evidence to show that the dressing-case in question came into the custody of the defendants under such circumstances as to make them responsible for its safe conveyance and delivery. They could not be said to have fulfilled their contract without delivery; and, if it was the usual course to deliver the luggage of passengers at a particular part of the platform, that was the sort of delivery the defendants took upon themselves to make." The only circumstances in which that case differs from the present, are, that, there, the dressing-case never was in the actual possession of the lady or her servant at all, and that it was placed in the railway carriage, not by the company's servants, but by the driver of the fly, who was the servant of Mrs. Richards *pro hac vice*; whereas here, the plaintiff himself took the carpet-bag into the carriage, and out again. In *The Great Northern Railway Company, App., Shepherd, Resp., 8 Exch. 30*,† it was held, that the luggage of a passenger by railway, though never delivered to any servant of the company, but kept by the passenger during the journey, is, nevertheless, in point of law, in the custody of the company, so as to render them responsible for its loss. So, in *Robinson v. Dunmore, 2 B. & P. 416*, *it was held, that, if A. sends goods by B., who says "I will warrant [*20 they shall go safe," B. is liable for any damage sustained by the goods, notwithstanding A. send one of his own servants with B.'s cart, to look after them. Chambre, J., there said: "The defendant is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case. The defendant attends with his horse and cart at the plaintiff's house, where the goods are delivered to him and put into the cart by the plaintiff's servants. This is a complete possession. How is this affected by the presence of the plaintiff's servant? It has been determined, that, if a man travel in a stage-coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." Here, the carpet-bag was delivered to the company, to be carried safely from Farnham to London, and there to be safely delivered to the plaintiff at the station. How has that contract been performed? The company's servant took the carpet-bag from the plaintiff's hand for the avowed purpose of delivering it in the accustomed way. There was no evidence as to what subsequently became of it. When the company's servant so took possession of it, the company had it under the original contract. [WILLIAMS, J.—It was consistent with the facts proved, that the porter might have given the carpet-bag to a confederate.] Quite so. Nobody

professes to know anything about it. The man was in court, but was not called. There was abundant evidence from which the jury might infer that the carpet-bag came to the hands of the defendants as carriers, and that they did not deliver it.

Bovill (with whom was *E. James*), in support of the *rule.—

*21] There is no authority directly in point. The ground upon which the decision of this court in *Richards v. The London, Brighton, and South Coast Railway Company* proceeded, was, that the duty of the company was not performed until they had delivered the luggage at the proper and usual place of delivery, viz., from the platform or from the railway carriage to the hackney coach, that forming a portion of the transit. There was no suggestion that Mrs. Richards had the manual possession of the case at all. [CRESSWELL, J.—It may be a question of fact whether, the contract being to deliver the passenger's luggage into a cab, the passenger has not consented to accept the delivery on the platform as a delivery in satisfaction of that contract.] The question, it is submitted, is, whether the company have not done all that by their contract they bound themselves to do. The plaintiff never having parted with the possession of the bag during the whole journey, what sort of delivery could the defendants make? Is it not enough that the plaintiff has it in his hand,—like a lady's reticule,—while on the platform at the terminus? Suppose a lady were to leave her purse or her reticule, or, as *Wilde, C. J.*, suggests in *Richards v. The London, Brighton, and South Coast Railway Company*, a pocket-book, upon a table in the waiting-room,—would the company be liable in case of its loss? [CRESSWELL, J.—The circumstance of this carpet-bag having been placed in the carriage with the plaintiff, or by him, if you will, seems, according to the case of *Robinson v. Dunmore*, to make no difference.] Some regard must be had to the nature of the article. [CRESSWELL, J.—Suppose it a stick or an umbrella. Is it not a question of fact whether or not the thing was delivered to the company to be carried?] Seeing the nature of the article here, and the manner in which the plaintiff conducted himself with regard to it, the question is, what was the duty of the company? and how

*22] they performed it? Can it be said that they gave any authority to this lamp-cleaner to enter into a new contract for them with respect to the plaintiff's carpet-bag, after the transit was at an end? [WILLIAMS, J.—It is not a question of a new contract; but as to a mode of dealing with passengers and their luggage which the company chose to adopt.]

JERVIS, C. J.—In the early part of this discussion, I was strongly impressed with a notion that the defendants were entitled to have this rule made absolute, because it occurred to me, before I heard the very ingenious argument of Mr. *Lush*, that there had been a perfect and complete delivery of the carpet-bag in question by the company to the

plaintiff at the end of the journey, and that they were not responsible for what occurred afterwards when the plaintiff permitted the porter or lamp-cleaner to take it for the purpose of helping the plaintiff to a cab. Upon further consideration, however, I think that it is not so. The case of *Richards v. The London, Brighton, and South Coast Railway Company* establishes, that, though not in express terms engrafted into it, it is a part of the contract of a railway company with its passengers, that their luggage shall be delivered at the end of the journey by the porters or servants of the company into the carriages or other means of conveyance of the passengers from the station. Parties may, however, if they choose, agree to accept a delivery short of such ordinary delivery: and it is possible that the facts here might have warranted the inference of a delivery short of that which I have referred to. But that would be a question for the jury. Here, however, the agreement entered into at the trial only enables us to make this rule absolute, if we should think that my Brother Maule ought to have nonsuited the plaintiff. Now, if there was no evidence that the plaintiff accepted the *delivery on the platform as a final and perfect deli- [*23
very, so as to put an end to the company's contract, I cannot say, that, as he intended to hire a cab, he did not also intend to avail himself of the services of the company's porters to procure a cab for him, and to place his luggage therein in the accustomed way. Until that was done, there was no delivery. Then, if there was no perfect delivery of the carpet-bag to the plaintiff while on the platform,—which was entirely a question of fact for the jury,—the company have not shown what they have done with it: for aught that appears, the bag may still be at the station. I think the case is governed by that of *Richards v. The London, Brighton, and South Coast Railway Company*, and consequently that the rule must be discharged.

CRESSWELL, J.—I am of the same opinion. There was *prima facie* evidence of the delivery of the plaintiff's carpet-bag to the company to be carried: there was also evidence the other way: and, if that was to be contested, the question should have been submitted to the jury. There was also a question whether the defendants had done what they by their contract undertook to do. According to the case of *Richards v. The London, Brighton, and South Coast Railway Company*, their undertaking was, to deliver the plaintiff's luggage in the usual and accustomed way,—to convey it from the railway carriage to a cab, if required so to do. There was evidence that that was not done. There was also evidence to support a case of acceptance short of that. But the learned judge was not asked to put it to the jury. If so, or unless the evidence was absolutely conclusive in the defendants' favour, it must be taken, as against them, that the jury could not have found for them. Another point was, whether the plaintiff had not by his own want of caution

*24] occasioned the loss, and so exonerated the *company. That might be so if the plaintiff had knowingly delivered the bag to a person not authorized by the company to deal with it. But that cannot be imputed to the plaintiff here; for, it was proved that the person whom he allowed to take the bag was a person wearing the ordinary dress of a porter belonging to the company. It seems to me, therefore, that there is no ground for disturbing the verdict.

WILLIAMS, J.—I am of the same opinion. The simple question for us to decide, is, whether the learned judge ought at the close of his case to have nonsuited the plaintiff. For the reasons stated by my Lord and my Brother Cresswell, I agree that he could not have done that without overruling the case of *Richards v. The London, Brighton, and South Coast Railway Company*. I can only say, that, if the man at the station really was deputed or employed, as suggested, by the plaintiff to carry his carpet-bag to a cab, and the cab-man ran off with it, it is to be regretted that the defendants did not prove that at the trial. I must confess I should have felt much difficulty in that case in saying that the plaintiff had not made the company's servant his agent for that purpose, and so discharged the company. No such evidence, however, having been given, the only question is, as I before stated, whether there was anything to go to the jury to establish a case of negligence against the company. I think it is impossible to say there was not, and therefore the rule must be discharged.

CROWDER, J.—I also think my Brother Maule would not have been justified in nonsuiting the plaintiff, and therefore that this rule cannot be sustained. It is quite clear that the carpet-bag was delivered to the company, and that it was to be carried by them. What was the *25] actual conveyance? What did the company contract to *do? There was evidence that the practice, on the arrival of a train, is, for the porters in the employ of the company to assist passengers to obtain cabs within the station and to place their luggage therein. For this service, no fee or gratuity is paid to, or permitted to be received by, the porters: it is all included in the charge for conveyance. It is manifestly for the advantage of the company that passengers and their luggage should be speedily despatched from the station or terminus on arrival. The present case appears to me only to be distinguishable from *Richards v. The London, Brighton, and South Coast Railway Company*, in this, that here the plaintiff had retained the carpet-bag in his own possession, and alighted from the carriage with the bag in his hand; whereas, in that case, Mrs. Richards had never personally interfered with the missing article. That, however, in my opinion, makes no real difference. It is the same as if the porter had taken the carpet-bag out of the carriage. There is nothing to show that the plaintiff elected to terminate the transit at that moment, as he intended to hire a cab for the conveyance of himself and his luggage. He was

clearly guilty of no negligence in intrusting the bag to the porter for the purpose of carrying it to the vehicle. It seems to me that the jury would have been well warranted in finding for the plaintiff, if the question of negligence had been submitted to them. Rule discharged.

*SIMPSON v. SADD. April 17.

[*26

Proceedings having been taken here and in equity in respect of the same subject-matter, the plaintiff was put to his election by an order of the Court of Chancery, and elected to proceed with his claim there. A judge at chambers having made an order for the payment by the plaintiff of the costs of the action,—The court ordered it to be rescinded; holding that the defendant's remedy, if any, was by application to the court of equity.

In April, 1854, the plaintiff commenced an action in this court against the defendant to recover 160*l.* 11*s.*, the price of certain fixtures sold and delivered by him to the defendant, and 54*l.* 19*s.* 11*d.* for the use and occupation by the defendant of certain premises of the plaintiff. On the 19th of April, the defendant pleaded never indebted, and issue was joined on the 24th, and notice of trial given for the first sitting in London in Trinity Term last.

On the same 25th of April, the plaintiff filed a special claim in Chancery, praying a specific performance of an agreement whereby the defendant had agreed to take from the plaintiff a lease or leases of the messuages mentioned in the declaration; and, on the 20th of May, the defendant obtained leave to add a plea of fraud. On the 26th of May, the defendant obtained an ex parte order of Vice-Chancellor Stuart, requiring the plaintiff within eight days to elect to proceed at law or in equity. The plaintiff elected to proceed in equity, and, the cause having been set down for trial, the record was on the 31st of May withdrawn, by consent.

On the 27th of June, an order was made by Vice-Chancellor Stuart in favour of the plaintiff, and directing the defendant to pay into the Bank, to the credit of the said cause, the three several sums of 160*l.* 11*s.*, 109*l.* 19*s.* 11*d.*, and 27*l.* 0*s.* 6*d.*, and also that the defendant should pay to the plaintiff the costs of the action at law. The defendant appealed against this order; and, on the hearing of the appeal, the Lord Chancellor varied the terms of the Vice-Chancellor's order, by, amongst other things, directing that such part of the same as [*27 *ordered the defendant to pay the plaintiff the costs of the action at law, should be omitted.

On the 2d of January, 1855, the defendant applied to Maule, J., for an order that the master should be at liberty to tax his costs of the action. The learned judge, however, declined to make any order. On the 19th, the defendant applied to the Lord Chancellor to vary the order so made by him on appeal; and by the order as finally settled, it

was declared that the defendant had waived his right to require the plaintiff's title to the said messuages; and it was ordered that the defendant should, within three weeks, pay into the Court of Chancery, amongst other sums, 27*l.* 0*s.* 6*d.*, the amount of the plaintiff's taxed costs in the cause; and that the defendant be at liberty to proceed at law, notwithstanding that order and the order of the 26th of May, 1854.

On the 23d of January, 1855, the defendant obtained an order of Crowder, J., "that the costs incurred by the defendant herein be referred to the master for taxation, and the amount found to be due be paid by the plaintiff to the defendant or his attorney, he the plaintiff having elected to proceed in equity for the same cause of action."

Gray, in Hilary Term last, obtained a rule calling upon the defendant to show cause why the order of Crowder, J., should not be rescinded, or why it should not be varied by directing the master to tax the defendant's costs up to and inclusive of the day on which the defendant had notice that the plaintiff's claim in equity had been filed, or up to such other time as the court should direct; and why the plaintiff should not be at liberty to pay the amount so to be found due from him for such costs into the Court of Chancery in part satisfaction of the sum ordered to be paid into that court by the defendant.

*28] *Petersdorff* now showed cause.—The order of Mr. Justice Crowder was perfectly regular, and consistent with the practice. The court will never allow proceedings to go on contemporaneously at law and in equity in respect of the same subject-matter. It is every day's practice to stay proceedings in a second ejectment until the costs of a former action are paid. The defendant has been guilty of no laches. He made his application to the Court of Chancery to put the plaintiff to his election, as soon as he could ascertain that the two proceedings were commenced in respect of the same subject-matter. As to the last branch of the rule, this court has no power to direct payment of money into the name of the Accountant-General: he is a mere officer of the Court of Chancery, and only receives money where he is directed to do so by an order of a court of equity.

Gray, in support of his rule.—If the proper course had been taken, the plaintiff might have shown his right to go on. He had a perfectly good cause of action: but, finding that his remedy would be more complete in a court of equity, he filed a claim for a specific performance of the agreement which the defendant had entered into with him. The Court of Chancery calling upon him to elect, he elected to proceed in Chancery. But this court can know nothing of the practice or the proceedings there. [CROWDER, J.—I thought that the election to proceed in equity was an election to discontinue the action here, and consequently that the defendant was entitled to costs. Probably I was wrong.] The plea of fraud was added after the plaintiff's claim in equity was filed.

JERVIS, C. J.—I think, that, if what has been done here is in viola-

tion of any order of the Court of Chancery, or of any compact or agreement made between the *parties in that court, the defendant must make his complaint there. We know nothing of the proceedings [*29 in equity.

The rest of the court concurring,

Rule discharged.

BENETT v. THE PENINSULAR AND ORIENTAL STEAM BOAT COMPANY. *April 21.*

A cause was tried before Lord Truro when Chief Justice of this court, and a bill of exceptions tendered, and the draft thereof submitted to his Lordship; but, in consequence of his elevation to the woolsack, and subsequent illness, all hope of getting it settled and sealed being at an end,—The court directed a new trial.

THIS was an action upon the case against a steamboat company for refusing to receive the plaintiff as a passenger,—the declaration alleging that the defendants were common carriers of passengers for hire from Southampton to a place beyond the seas, to wit, Gibraltar.

The cause was tried in 1847. The question intended to be raised, was, whether the custom of the realm extended to a carrying beyond the seas: see *Benett v. The Peninsular and Oriental Steamboat Company*, 6 C. B. 775 (E. C. L. R. vol. 60). A verdict was found for the plaintiff, with an understanding that the point was to be raised by a bill of exceptions.

In Hilary Term, 1848, a rule nisi was obtained by the defendants for a new trial on the ground of misdirection. That rule was discharged on the 6th of December following, upon a technical ground.

The draft of a bill of exceptions was laid before Wilde, C. J.; but, in consequence of his having been appointed Lord Chancellor, delay unavoidably arose in getting it settled, and ultimately, in consequence of his lordship's infirm state of health, all hope of its being settled by him was at an end.

Petersdorff now moved for a rule calling upon the *defendants [*30 to show cause why the plaintiff should not be at liberty to issue execution, or why there should not be a new trial. The former part of his motion he founded upon *Crouch v. The London and North-Western Railway Company*, 14 C. B. 255 (E. C. L. R. vol. 78), where this court held, that one who holds himself out as a carrier of goods between two places one of which is beyond the confines of England, is still subject to the common-law liability of a carrier for hire, and is bound to accept all goods which are reasonably tendered to him for conveyance between those limits; and the latter upon *Newton v. Boodle*, 8 C. B. 795 (E. C. L. R. vol. 54), 4 D. & L. 664, and *Nind v. Arthur*, 7 D. & L. 252, where the benefit of a bill of exceptions having been lost to the

party, without any default on his part, by the death of the presiding judge before the sealing, the court directed a new trial.

Prentice, who was instructed to show cause in the first instance, admitted that the cases cited precluded him from opposing the latter branch of the motion.

CRESSWELL, J.(a)—I fear the court can do no more than remit the parties to the place where the difficulty began. We must make the rule absolute for a new trial.

The rest of the court concurring, Rule absolute accordingly.

(a) Jervis, C. J., had been counsel in the cause.



*31] *SMITH, Appellant; DOUGLAS, Respondent. April 20.

Upon an appeal from the decision of a county court, in an action for dilapidations, the case, without saying what the evidence given was, stated that the judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises, with the particulars in their hands, and would therefore be able to judge whether and to what extent the plaintiff had made out his case:—The court directed a new trial.

THIS was an appeal from a decision of the county court of Cheshire holden at Northwich.

The action was brought to recover compensation from the defendant (the appellant) for various injuries alleged to have been done by him to the dwelling-house, out-buildings, fences, and a few acres of land of the plaintiff (the respondent), which the defendant had occupied as tenant from year to year, from 1849 to 1854, at an annual rent of 50*l*.

The plaintiff estimated the damage he had sustained at 115*l*., but had reduced his claim to 50*l*. in order to bring the case within the jurisdiction of the county court. The defendant had paid 7*l*. into court in satisfaction of any damage for which he might be held liable.

Before commencing the trial, the jury viewed the premises, *taking with them the particulars of demand*, which, with the summons, were annexed to the case.

The plaintiff, in presenting his case to the jury, claimed at their hands damages for injury to the house and out-buildings themselves; to the landlord's fixtures, such as boiler, bath, grate, &c.; to the gates and fences; for the improper treatment of the land, both as regarded the succession and management of the crops, &c.; and for using a meadow as a training-ground for horses; and also for the removal of a large quantity of manure.

There was no lease or agreement in writing between the parties; but the previous tenant had left in consequence of a dispute between him

and the plaintiff about the removal of manure, which was alluded to in a negotiation between the plaintiff and the defendant.

The plaintiff set up an oral agreement that no manure *was to be carried away, and that there was to be no bother about the manure. The defendant kept a great number of horses; and the quantity of manure produced was very much greater than the produce of the land would make. [*32]

It was objected, on behalf of the defendant, that no such agreement could be binding without being in writing, if it were intended to apply beyond one year. But the judge held, that there was nothing in the agreement to postpone its operation to the end of the year, and that, being a good agreement when made, the fact that the tenancy was tacitly renewed from year to year for five years would not vitiate it.

As regarded the injury to the buildings, the plaintiff proved that they were in good repair when the defendant entered: and he gave very general evidence as to the injury. It was contended for the defendant, that the plaintiff was bound to prove the damage charged, and therefore to go item by item specifically through the particulars of demand which he had furnished. But the judge held, that this was not like an action for goods sold and delivered, and that the plaintiff might if he pleased rest upon general evidence in support of his particulars of demand, without proving the loss of each particular key, or every fracture of every pane of glass; especially as the jury had already viewed the premises, with the particulars in their hands, and would be well able to judge whether the plaintiff made out a case to any and what extent.

In summing up the case, the judge pointed out to the jury the different position of a tenant from year to year without any covenant at all, and a tenant by lease covenanting to do certain things, telling them that the rule of law was, that a tenant from year to year was only bound to keep the buildings wind and water tight, and not to commit wilful waste.

As regarded the boiler, bath, kitchen grate, &c., he intimated an opinion that allowance ought to be made *for reasonable wear and tear, but not for abuse; and that, if a tenant took as much care of his landlord's fixtures as a reasonable man would of his own, there could be no just ground of complaint. [*33]

As regarded the treatment of the land, the evidence was conflicting: but the judge, leaving the question to the jury, expressed his own opinion, that, upon that point, as well as upon the gates and railing, which appeared to have decayed from natural causes, the plaintiff's case, if any, was very slight.

With regard to the manure, he also said it would be unreasonable, in the absence of some more positive agreement than had been proved, to suppose that more was meant than that the land should not be denuded

of manure proportionate to its own produce: but he did not nor was he asked to put it to the jury to consider what would be the rule of good husbandry in such a case, in the absence of any agreement.

The jury returned a verdict for 23*l.* in addition to the 7*l.* paid in.

If the court should be of opinion that the judge of the county court was wrong,—first, in admitting general evidence of the oral agreement, or,—secondly, in admitting general evidence of want of repair, and not requiring the plaintiff to go item by item through the particulars of his demand for damage, or,—thirdly, in telling the jury that a tenant from year to year, though liable for wilful or wanton neglect, is not liable for permissive waste, or reasonable wear and tear, then there ought to be a new trial.

The appeal came on to be heard in Hilary Term last, when—

*34] *Aspland*, for the appellant, (a) submitted that the *case,—which was stated by the judge of the county court, the parties having been unable to agree,—disclosed misdirection on the judge's part, for that it was not enough, to entitle the plaintiff below to recover, that he should give general evidence of want of repair, but that he was bound to show a want of repair in respect of the matters stated in the particulars. [MAULE, J.—He might give general evidence of glass being broken, paper torn, flooring damaged, and so forth; those being matters referred to in the particulars of dilapidations.] There was no evidence of want of repair in respect of any of the matters mentioned in the particulars. [MAULE, J.—I observe the judge says that this is not like an action for goods sold and delivered. I do not agree with him. The object of particulars, is, that the plaintiff should confine his evidence to the matters therein mentioned, not strictly and technically, but reasonably: and that applies as much to broken windows as to goods sold and delivered.] It is quite clear that the judge thought it unnecessary to do here something which it would have been necessary for the plaintiff to do in an action for goods sold and delivered. [JERVIS, C. J.—The judge has not very clearly told us what he did tell the *35] jury.] *By the 65th section of the County Court Act, 9 & 10 Vict. c. 95, the plaintiff is precluded from travelling out of the summons; and by the 27th section of the rules framed pursuant to the 12 & 13 Vict. c. 101, the particulars are made part of the summons. As regards the condition of the buildings, the jury clearly were not

(a) The points marked for argument on the part of the appellant, were as follows:—"That the judge misdirected the jury, and received improper and insufficient matters in evidence of the claim of the plaintiff below. The appellant will rely on the same objections as those taken on his behalf in the county court, and mentioned in the case: and he will contend, that the plaintiff below was bound to prove his case with reference to the items of his particulars; that the 'very general evidence' mentioned in the case was insufficient, and was improperly left to the jury as proof of the plaintiff's case; that the reference by the judge to the view of the premises had by the jury, was improper, and was likely to mislead the jury, and amounted to an admission by the judge of improper evidence; and that the judge improperly directed the jury (by inference) that the care which a reasonable man would take of his own fixtures, was a test of the liability of a tenant in respect of his landlord's fixtures."

properly instructed as to the principles upon which they were to proceed in assessing the damages: they were distinctly told that they might act upon their own view. That was manifestly incorrect. In *Hardy v. Baxendale*, 9 Exch. 341,† the want of instruction to the jury in this respect, was held to be a misdirection. The direction to the jury as to the boiler, bath, kitchen grate, &c., was also calculated materially to mislead them.

C. Pollock, contra.(a)—The particulars, with the summons, form in effect the declaration in the county court, and are to receive a fair and liberal construction. The jury having viewed the premises, general evidence was properly received of the dilapidations mentioned in the particulars. [MAULE, J.—The judge tells the jury that the items need not be proved, as in the case of goods sold and delivered. It is consistent with that, that the witness's evidence did not include any one of the items contained in the particulars.] It is submitted that that is scarcely the fair result of what the case states. [CRESWELL, J.—It is very ambiguous, to say the least of *it. If the witness gave general evidence that all the matters referred to in the particulars [*36 were dilapidated, that might do. MAULE, J.—The judge has not shown us upon what he really did decide. I think the case ought to be sent back to him, in order that he may give us some idea of what the evidence was. *Aspland*.—He in effect tells the jury that they may disregard the evidence, and judge of the amount of dilapidations from what they saw. CRESWELL, J.—No. He says the jury may act upon general evidence of dilapidations, because they have seen the premises.]

JEVVIS, C. J.—The case must go back to the judge, to be re-stated. He must tell us the general nature of the evidence given, and how he directed the jury upon it.

The case was accordingly sent back to the judge, who returned it with the following additional statement:—

“This case being referred back to me, with a request that I would inform the court of the evidence, or the general nature of the evidence, given on the trial, and of my direction to the jury, I have to state, that, though the particulars of the plaintiff's demand comprise several distinct classes of injury, the cause almost entirely turned upon the alleged damage to the dwelling-house and fixtures.

“On behalf of the plaintiff, it was proved, that the premises were put in complete repair about the time the defendant entered; and that, when he left, the kitchen boiler and several pipes were burst and use-

(a) The following points were marked for argument on the part of the respondent:—“That the judge of the county court was right in admitting evidence of the oral agreement as to the manure mentioned in the case [see *Tress v. Savage*, 4 Ellis & B. 36 (E. C. L. R. vol. 82)]; that the admission of the general evidence as to the want of repair mentioned in the case, and the not requiring more particular evidence, was not a proper or sufficient cause of appeal; that under the circumstances, the judge was not bound to require more particular evidence with respect to such want of repair; and that a tenant from year to year is not liable for permissive waste, or reasonable wear and tear.”

less; that the cistern, bath, and water-closet were more or less out of order; and that, so far as the plumbing department was concerned, there was every appearance of gross neglect, not to say destruction.

"It was also proved that a quantity of shelves, hatrails, and so forth, had been removed. One witness, who had great experience in such *37] matters, had examined *the premises minutely, producing his own valuation, upon which he might have been cross-examined, and from which he swore, that, to the best of his judgment, it would take 48*l.* 1*s.* 5*d.* to put the premises in a tenantable condition, over and above a reasonable allowance for wear and tear. Another witness swore, that, including the fences and gates, but exclusive of injury to the land, and exclusive of reasonable wear and tear, the injury to the premises was, in his opinion, not less than 51*l.* 2*s.* 6*d.*

"On the other hand, witnesses for the defendant swore, that, what ought to be done by an outgoing tenant from year to year, could not amount to the sum which the defendant had paid into court.

"Believing the real question to be, whether the defendant had or had not paid enough into court, I so left it to the jury, with the remarks stated in the case.

"With regard to the removal of the manure, it was not denied by the defendant that he had removed it: on the contrary, it was contended that the agreement not to remove was not binding upon him at all; and that he had a right to remove, if not the whole, at all events the excess over and above what the land would reasonably produce. The quantity that had been removed was not proved. It was also admitted that some of the fences and railing had been removed: but it was sworn by the defendant's witnesses that they were rotten. No great stress was laid upon these or upon the other grounds of complaint; and the jury returned their verdict for the plaintiff, unaccompanied with any remark."

Aspland, for the appellant.—Little if any new light is thrown upon the case by the additional statement of the judge. The evidence which he now states was given, does not appear to apply itself at all distinctly to the particulars. [CRESWELL, J.—It does not appear that that ob- *38] jection was made before the judge. JERVIS, C. J.—*The witness could not properly be allowed to give evidence out of the particulars. In the absence, therefore, of any objection on that score, we must assume that the evidence, such as it was, applied to the matters referred to in the particulars.] The plaintiff was bound to prove a case strictly within his particulars. [CRESWELL, J.—Was it not the defendant's duty, when general evidence of dilapidations was given, to object that it was not warranted by the particulars, and that he was misled? Before the rule of court(a) requiring the particulars of demand to be annexed to the declaration, who would have had to prove the particulars?] The defendant, no doubt. [CRESWELL, J.—That shows that

it was his duty to object.] There was, at all events, a clear misconception in the mind of the judge, in holding that the plaintiff might if he pleased rest upon general evidence in support of his particulars of demand,—“especially as the jury had already viewed the premises, with the particulars in their hands, and would be well able to judge whether the plaintiff made out a case to any and what extent.” That, of itself, was clearly a misdirection. The view by the jury is not intended as a substitution for evidence; but only the better to enable the jury to appreciate the evidence when afterwards given before them. *Hadley v. Baxendale*, 9 Exch. 341,† shows that an omission properly to direct the jury amounts to a misdirection.

C. Pollock, *contra*.—The objection to the generality of the evidence, not having been taken in the court below, cannot be urged now. [*JERVIS*, C. J.—The additional statement by the judge certainly affords us very little assistance. Consistently with what he told the jury, they may have acted in total disregard of all the witnesses, and come to the conclusion they did from the *mere view.] General evidence was given that the premises were in good repair when the defendant [*39 entered: and the plaintiff gave very general evidence as to the injury. [*WILLIAMS*, J.—What do you understand by “general evidence” in support of the particulars?] The judge states that a witness who had great experience in such matters, and had examined the premises minutely, produced his own valuation of the dilapidations, upon which the defendant might have cross-examined him. Substantial justice, it is submitted has been done, and the appeal is groundless.

Aspland, in reply, was stopped by the court.

JERVIS, C. J.—I think it is not possible for the verdict to stand. I cannot see any evidence that was specifically addressed to the complaint in the summons and particulars: and it is possible that the jury may, upon this summing up, have acted altogether without evidence, relying upon the particulars and their own view of the premises, as the original statement of the case seems to show they were directed to do.

CRESSWELL, J.—The county court judge has not in his new statement explained to us what evidence he left to the jury, or how he instructed them to deal with it. Upon the whole, it is much too unsatisfactory for us to rely upon.

WILLIAMS, J.—I have great difficulty in discovering upon the statements submitted to us what the judge really did do. There is no distinction, as to proof of the particulars, between an action of this sort and an action for goods sold and delivered. There must have been some strange misconception on the part of the learned gentleman. There must be a new trial.

Rule accordingly.

*40] **STRETTON v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. May 2.**

In an action against a railway company under Lord Campbell's Act, 9 & 10 Vict. c. 93, the presiding judge intimating a strong opinion that the defendants were not liable, and the company being willing to give the plaintiff 150*l.* without admitting a liability on their part, it was agreed between the counsel that a juror should be withdrawn, and nothing more was done:—*Semble*, that the court could not, under the circumstances, give effect to the plaintiff's attorney's claim of lien.

THE plaintiff in this case, as widow and administratrix of one Joseph Stretton, her late husband, sought to recover from the London and North-Western Railway Company compensation in damages under Lord Campbell's Act, 9 & 10 Vict. c. 93, for his death, which resulted from a collision between two goods trains on the defendants' railway, upon one of which the deceased had been employed as fireman. It appeared that the accident had occurred through the negligence of the engine-driver, the fellow servant of the deceased, who had brought his train into the Walsall Station at a rapid pace, in defiance of the ordinary signals. These facts having been proved on the part of the plaintiff, and a great deal of evidence having been given on the part of the defendants to show the general competency of the driver, Lord Campbell, before whom the cause was tried at the last Assizes at Stafford, said he should tell the jury that no case of negligence had been made out against the company, and should direct them to find a verdict accordingly; and that, if the jury should find for the plaintiff, the verdict would not be allowed to stand.

Upon this intimation from his Lordship, Mr. *Keating*, who was counsel for the company, communicated with Mr. *Whateley*, the plaintiff's counsel, and proposed to give the plaintiff 150*l.*, whereupon it was agreed that a juror should be withdrawn, and Mr. *Keating* endorsed his brief thus,—“Juror withdrawn, and the company, without being liable, agree to pay the widow 150*l.*”

*41] *Hodgson*, on a former day in this term, obtained a rule *calling upon the defendants to show cause why they should not be restrained from paying to the plaintiff personally the 150*l.* so agreed to be paid by them at the trial, without first satisfying the claim of Messrs. D. & H., her attorneys, and why, in default of the defendants paying them the amount of their lien, the cause should not be tried afresh. He submitted that the lien of the attorney attaches upon everything that results to the client as the fruit of the attorney's labour and skill, whether obtained by the judgment of the court or by compromise: and he referred to *Welsh v. Hole*, 1 Dougl. 238, and *Davies, Dem.*, Lowndes, Ten., 3 C. B. 823 (E. C. L. R. 54).^(a)

Keating now showed cause, upon an affidavit stating that the solicitors who represented the company at the trial, intended the 150*l.* to be

(a) In that case, the terms of the compromise were embodied in a rule of court.

a gratuity for the widow, and would not have consented to give that sum if they had imagined that any part of it would go into the pockets of the attorneys. He submitted that this was not the case of a compromise at all; that the plaintiff's counsel consented to withdraw a juror unconditionally, and without reference to a settlement of the action, which was then virtually at an end. [WILLIAMS, J.—If the money is paid to the plaintiff herself, she will be liable to her attorneys. JERVIS, C. J.—There certainly is great difficulty in saying that the attorneys can under the circumstances call upon the court to interfere.]

Keating then proposed that the plaintiff's attorneys should be paid to the extent of moneys actually expended by them; to which proposal, *Hodgson*, on the part of the attorneys, assented, provided it was made to include the costs incurred by them in obtaining letters of *ad- [*42 ministration in order to enable the widow to bring the action.

Ultimately, the following rule was drawn up:—"Rule discharged without costs: And, by consent of counsel for Messrs. D. & H., and for the defendants, it is ordered that it be referred to the master to ascertain the amount of the plaintiff's costs out of pocket, such costs out of pocket to include the amount that was proper to be paid for administration, to enable the plaintiff to bring this action,—the defendants by their counsel agreeing to pay to the said Messrs. D. & H. the amount so ascertained; the said D. & H. by their counsel undertaking to release the plaintiff from all further claim whatever for costs."

THE SOUTH METROPOLITAN CEMETERY COMPANY v. EDEN. *May 8.*

The plaintiffs and the defendant each purchased lands of one W., which were separated by a road over which a right of way was reserved to each (the freehold remaining in W.), with a joint obligation to repair it.

In the conveyance to the plaintiffs, the land purchased by them was described as containing thirty-one acres or thereabouts, "which with the abutments and boundaries thereof were more particularly described in the map or plan thereof affixed to and forming part of the indenture, together with full and free liberty, license, and authority for the said company (the plaintiffs), their successors and assigns and tenants, and all persons coming to or going from the same lands and hereditaments, or any part thereof, to use and enjoy, with horses, carts, and carriages, or on foot, jointly or in common with others the person or persons for the time being entitled to the like liberties, licenses, and authorities respectively, the roads or way leading to and from the same lands and hereditaments, as the same roads or ways are described in the said map or plan."

At the time of the conveyance, the land so purchased by the plaintiffs was separated from the road by a hedge in which were two gates, one at the upper, the other at the lower end of the road. The plaintiffs removed the hedge, and built a wall with two gates therein, both at some distance from the spot where the old gates had stood.

The defendant obstructed the access to these new gates, by excavating the road to the depth of between four and five feet:—

Held, that the defendant was liable to an action at the suit of the plaintiffs; for that, whether they were justified in altering the position of the gates or not, they were still entitled to the uninterrupted use of the way as granted to them.

But, *semble*, that the grant was a general grant of a right of way along the road and every part thereof, and was not limited to a way through the old gates.

THIS was an action for an alleged obstruction by the defendant of the plaintiffs' right of way.

*43] *The declaration stated, that, before and at the time of the committing of the grievances thereafter mentioned, the plaintiffs were possessed of certain land used as a cemetery, and abutting on certain land from which the land of the plaintiffs was divided by a wall of the plaintiffs'; and by reason thereof the plaintiffs during all the time aforesaid ought to have had, and still of right ought to have, a certain way from and out of the said land, unto, into, through, and over a certain close into a certain Queen's highway, and from thence back again unto, into, through, over, and along the said close, unto and into the said land of the plaintiffs, for themselves and their servants, on foot and with horses, carts, and other carriages, to go, return, pass, and re-pass every year, and at all times of the year, at their free will and pleasure, and without the obstructions thereof thereafter mentioned; and the plaintiffs, by reason of the possession of their said land and wall, were during all the time aforesaid entitled to have the said wall supported by the part of the said land adjoining the said wall, without the interruption or disturbance thereof thereafter also mentioned: Yet the defendant wrongfully dug away large quantities of mould, stones, and rubbish from parts of the said road to which the plaintiffs were entitled as aforesaid, and the defendant had from thence hitherto continued the said mould, stones, and rubbish so dug away from the said part of the said road, whereby the plaintiffs were hindered and prevented from the use of the said road, on foot, and with horses, carts, and carriages, in so convenient a manner as they otherwise could have done, and as they were entitled to do: And the defendant also dug away, and from thence had continued so dug away, the earth and soil of the part of the said land next adjoining to the said wall of the plaintiffs, and thereby weakened the foundations of the said wall, *44] *and damaged and injured the said wall. And the plaintiffs claimed 500*l*.

The defendant pleaded,—first, not guilty.

Secondly,—to the first breach,—that the plaintiffs ought not, at the said times when, &c., or either of them, to have had, nor ought they still of right to have, the said supposed way from and out of the said land, unto, into, through, and over the said close into the said Queen's highway, and from thence back again unto, into, through, over, and along the said close, unto and into the said land of the plaintiffs, for themselves and their servants, on foot or with horses, cattle, carts, and other carriages, or either of them, to go, return, pass, and re-pass every year, and at all times of the year, at their free will and pleasure, as the plaintiffs had above alleged.

Thirdly,—to the first breach,—that the said road in the said first breach mentioned was and is a certain private road in the parish of

Norwood, in the county of Surrey, leading from a certain common or public highway called the Elder Hole Road, and turning in an easterly direction for the distance of two hundred yards or thereabouts, bounded on the north side by the said land of the plaintiffs in the declaration mentioned, and on the south side in great part by certain land of the defendant; that, before and at the time of the committing of the grievances in the said first breach mentioned, he the defendant was, and thence hitherto had been, and then and still was, possessed of the said land lastly thereinbefore mentioned, and during all the time aforesaid ought to have had, and still of right ought to have, a certain way from the said land unto, into, through, over, and along the said road first thereinbefore mentioned, unto and into the said common or public highway, and so from thence back again from the said common or public highway unto, into, through, over, and along the said road first thereinbefore mentioned, unto and into the said land so in the [*45 possession of the defendant as aforesaid, for himself and his servants, on foot and with horses, carts, and other carriages, to go, return, pass, and repass, every year and at all times of the year, at his and their free will and pleasure; that, before and at the time of the committing of the said grievance in the said first breach mentioned, the said road first thereinbefore mentioned was in a foul, miry, bad, and impassable condition; and that he the defendant, being so entitled as last aforesaid to the use of the said road first thereinbefore mentioned, and being desirous of using the same, it became and was necessary to repair the same so as to render the same sound and passable, wherefore the defendant, at the said time when, &c., for the purpose of repairing the said road and of making the same sound and passable, did necessarily commit the said grievances in the said first breach mentioned, as he lawfully might for the cause aforesaid.

Fourth plea, to the second breach, that the plaintiffs were not, at the said times when, &c., or either of them, entitled to have the said wall, or any part thereof, supported by the said part of the said land, in manner and form as the plaintiffs had above alleged.

The plaintiffs took issue upon all the pleas; and, as to the third plea, newly assigned that they sued not only for the grievances therein admitted, but also for grievances committed by the defendant in excess of the alleged rights, and in other parts of the said way of the plaintiffs, and on other occasions, and for other purposes, than those referred to in the said plea.

The defendant pleaded to the new assignment,—first, not guilty,—secondly, a traverse of the right of way claimed by the plaintiffs,—thirdly, leave and license,—fourthly,—that, before and at the time of committing *the said grievances above newly assigned, the plaintiffs were, and from thence hitherto had been, and still were, [*46 jointly liable with the defendant to repair and amend the said road at

the joint costs and charges of the plaintiffs and defendant; and that, after the committing of the said grievances above newly assigned, and before the commencement of this suit, he the defendant, at the request of the plaintiffs, and as and by way of accord and satisfaction for the said grievances, repaired and amended the said road at his own sole proper costs and charges, and the plaintiffs then agreed to accept, and then did accept, the said reparations and amendments in full satisfaction and discharge of the grievances to which that plea was pleaded. Issue thereon.

The following description and particular of the trespasses newly assigned was delivered pursuant to an order of Lord Campbell:—"The making and excavating by the defendant of a new road in and through the road in the third plea mentioned, at the distance of four feet or thereabouts in one point from the plaintiffs' lands in the third plea mentioned, and from that point in an eastwardly direction proceeding up to and cutting through the southern side of the road in the third plea first mentioned; and the making from a point at a distance of four feet or thereabouts from the plaintiffs' lands in the third plea mentioned, a line of embankment proceeding in a south-eastwardly direction across the road in the third plea first mentioned, towards and through the southern side of it, and the making, keeping up, and continuing in existence by the defendant of the above-mentioned new road and embankment, and the works connected therewith, from the time of making them until the present time, in such a manner as to obstruct and render less convenient the plaintiffs' right of way, and to impair the evidence thereof."

*47] The cause was tried before Platt, B., at the last Assizes at Kingston.

The following, amongst other admissions, signed by the respective attorneys, were put in:—"1. That certain indentures of lease and release dated respectively the 22d and 28d of May, 1825,—the latter made between the Right Hon. John Earl of Eldon, the Rev. Edward South Thurlow, and John Forster, of the first part, John Woolley of the second part, and John Jones of the third part,—were severally executed by the several parties thereto as they purport to have been; and that copies of the said indentures, and of the plan therein referred to, may be read in evidence upon the trial of this cause, without production or proof of the said indentures or either of them. 2. That the lands, hereditaments, and premises mentioned in the said indentures, and described in the plan annexed to the said indenture of release, became and were on or before the 1st of January, 1826, duly vested in the said John Woolley for an absolute estate of inheritance."

The plaintiffs are the South Metropolitan Cemetery Company, incorporated by the 6 & 7 W. 4, c. cxxix. Shortly after obtaining their act of incorporation, the plaintiffs contracted with Woolley for the purchase

of about thirty acres of copyhold land (afterwards enfranchised) at Norwood, and upon the land thus purchased and certain adjoining land purchased by them from other persons, formed a burial-ground or cemetery.

The principal entrance to the cemetery is nearly opposite to the district church called St. Luke's, on the main road, called The Elder Road, which leads from London, viâ Denmark Hill and Camberwell, to Upper Norwood. A short distance beyond the church is a public road diverging to the East, called The Gipsy House Road; between which and the plaintiffs' cemetery is another road, also diverging from the Elder Road *towards the East, called Pilgrim Hill, the whole of [*48 which was originally a private road; but for many years houses have been erected at the lower end, on the Northern side, next the Elder Road. Immediately above the Easternmost of these houses, and on the Northern side of the road called Pilgrim Hill, the Southern boundary wall of the plaintiffs' cemetery commences. Before the formation of the cemetery, the site of it was used as meadow land, and there was a hedge where the wall now stands,—with two gates therein opening on to the land, the one at the upper and the other at the lower end. When the plaintiffs took possession of the land they removed the hedge, and erected upon the site of it a wall and iron railings, with two gates opening upon the road, but neither of them being at the same places where the old gates had stood. The obstruction complained of,—which was admitted to have been done by the order of the defendant,—consisted in the excavation of the road near to one of these new gates, to a depth of between four and five feet, so as to prevent the plaintiffs from having access thereto.

The conveyance from Woolley to the plaintiffs, dated the 29th of November, 1836, described the premises, with the right of way, as follows:—"All those several closes, pieces, or parcels of land adjoining together, and situate, lying, and being at Norwood, in the parish of Lambeth, in the county of Surrey, containing altogether thirty-one acres or thereabouts (were the same more or less), which with the abutments and boundaries thereof were more particularly described in the map or plan thereof affixed to and forming part of the indenture,—together with full and free liberty, license, and authority for the said company, their successors and assigns, and tenants, and all persons coming to or going from the same lands and hereditaments, or *any part thereof*, to use and enjoy, with horses, carts, and carriages, or on *foot, [*49 jointly or in common with others the person or persons for the time being entitled to the like liberties, licenses, and authorities respectively, the roads or ways leading to and from the same lands and hereditaments as the same roads or ways were described in the said map or plan."

The defendant also claimed under Woolley by virtue of an indenture of 1839, conveying to him certain land by the description of "All that

piece or parcel of ground situate, lying, and being at Norwood, in the parish of Lambeth, in the county of Surrey, and within and holden of the manor of Lambeth, abutting on the North East on a new road leading out of a new road called the Pilgrim Road to Pilgrim Hill on the North West on a copyhold piece or parcel of ground sold or contracted to be sold by the said John Woolley to J. Sheldrick, South West on copyhold lands of the said John Woolley bounding a piece of ornamental water, and South on other copyhold land of the said John Woolley, and which said piece or parcel of ground hereby covenanted to be surrendered contains by admeasurement, on the North East side thereof 540 feet of assize, little more or less, &c., &c., which said piece or parcel of land hereby covenanted to be surrendered is more particularly delineated and described in the plan drawn in the margin of these presents, and coloured green; and also all that other piece or parcel of ground situate at Norwood aforesaid, and holden of the said manor, abutting on the East and West on copyhold land late of Mr. H. Littlewood, but now of the said T. E. Eden, on the North on land belonging to the South Metropolitan Cemetery Company, and on the South by the said road called Pilgrim Road, leading into the Dulwich Road, and which said last-mentioned piece or parcel of ground is more particularly delineated and described in the said plan drawn in the margin of these

*50] presents, and is coloured pink,—*Together with a free and uninterrupted way or passage, and liberty and privilege of way and passage, ingress, egress, and regress to and for him the said T. E. Eden, his heirs and assigns, and undertenants, and for such other person or persons as the said T. E. Eden, his heirs or assigns or undertenants shall think proper, and either alone or together with any other person or persons whomsoever, and either on foot, horseback, or in carriages, or in any other manner howsoever, and also for all or any of the workmen, labourers, and servants, and the carts, wagons, wains, instruments of husbandry, and other carriages, vehicles, or machines whatsoever, and the horses, cows, oxen, sheep, hogs, and other cattle whatsoever of him, them, or any or either of them, *jointly and together with all other persons entitled or privileged to use the same*, in, through, over, long, across, and upon all that the said new road or way now called or known as the Pilgrim Road, leading out of and from the Dulwich Road aforesaid, to and round a certain triangular piece of land purchased by the said T. E. Eden of the said H. Littlewood, and also in, through, over, along, across, and upon other part of the said new road or way called or known as Pilgrim Hill, being a continuation of Pilgrim Road, and leading into the Elder Hole Road, and also, in, through, over, along, across, and upon a certain other new road or way leading out of Pilgrim Road aforesaid into Pilgrim Hill aforesaid, and which last-mentioned road or way forms the North Eastern boundary of the land or ground hereby first covenanted to be surrendered, and is mentioned in

the said plan drawn in the margin of these presents as the Occupation Road, together with full and free liberty for all or any of the said wagons, carts, or carriages, to be loaded with and to carry any goods, materials, or things whatsoever, and so often and in such manner as he the said T. E. Eden, his heirs, assigns, or undertenants, workmen, labourers, and *servants shall think fit or expedient, and at his [51 and their free will and pleasure, the said T. E. Eden, his heirs, appointees, and assigns, and his and their tenants, bearing and paying the expenses of maintaining and keeping the said roads in good repair and condition."

On the part of the defendant it was insisted that the plaintiffs' right of way was limited to the use of the road for the purpose of access to the gates as they originally stood, and that they could not acquire a larger or a different right by opening new gates at other and different places: and the case of *Allan v. Gomme*, 11 Ad. & E. 759 (E. C. L. R. 39), 3 P. & D. 581, was relied on.

For the plaintiffs it was submitted that the right of way reserved to them enabled them to use the road for the purpose of obtaining access to their land at any part thereof.

The learned Baron ruled that the plaintiffs' right of way was not affected by the change in the position of the gates; and accordingly a verdict was entered for the plaintiffs,—the amount of damages being agreed to be referred.

Creasey, on a former day in this term, obtained a rule nisi for a new trial, on the ground of misdirection. He cited *Allan v. Gomme*, and *Henning v. Burnet*, 8 Exch. 187.†

Bramwell and *Willes* now showed cause.—The facts are shortly these:—In 1836, Woolley was possessed of certain meadow land, by the side of which was a road (the soil of which also was Woolley's) from which the land was separated by a hedge in which there were two gates, one at the lower the other at the upper end. The cemetery company having purchased the land,—as the conveyance recited,—for the purposes of the cemetery, pulled down the hedge, and built a wall instead of it, erecting *therein two gates, but neither of them at the pre- [52 cise spot where the old gates had stood. The defendant also purchased from Woolley land on the other side of the road in question. To each was granted a right of way along the road to the lands respectively purchased by them; and both were bound to contribute to its repair. It is said, that, because there is a plan annexed to the conveyance to the plaintiffs, which plan discloses the existence of two gates, one at the lower the other at the upper end of the road, and the deed reserves to the plaintiffs the use of "the roads or ways leading to and from the same lands and hereditaments, as the same roads or ways are described in the said map or plan," the plaintiffs' right is limited to an user at the points of ingress and egress indicated in that plan: and for

this *Allan v. Gomme* and *Henning v. Burnet* were relied on. *Allan v. Gomme* was a grant of a definite right of way, and therefore can have no application here. So, in *Henning v. Burnet*, a defined right of way was given from A. to B.; and Parke, B., said that did not authorize the defendant to use another way. How can that be applicable to a case where, as here, the right to use the way is given to the grantees, their assigns and tenants, "and all persons coming to or going from the same lands and hereditaments, *or any part thereof?*" It is a grant of a described road for the purpose of getting to the lands which are the subject of the conveyance, or any part thereof. [CRESSWELL, J.—To use the way it will be said, as it is described in the plan, viz. by the two then existing gates.] It means, as the *road* is described, not the *user*. [CRESSWELL, J.—The gates form no part of the road as described in the plan.] Certainly not. If the argument on the other side were correct, the plaintiffs would be precluded from *enlarging* the gates, as well as from changing their position. Suppose a portion of this land *53] had been conveyed by the plaintiffs to a third party, *could it be said that the grantee of part would be precluded from acquiring a right of way thereto? Where a house which had a pew in the parish church annexed to it, was divided into two, it was held that a portion of the pew went with each part of the house,—*Harris v. Drewe*, 2 B. & Ad. 164 (E. C. L. R. 22). But, even assuming that the right of way granted to the plaintiffs did not enable them to avail themselves of their new gates, the acts admitted to have been done by the defendant are a clear violation of their original and indisputable right.

Montagu Chambers and *Creasey*, in support of the rule.—Wherever a person possessing an easement makes a substantial change therein so as to increase the burthen to the servient tenement, the right is either suspended or altogether gone. [CRESSWELL, J.—There is no servient tenement here: the defendant does not claim the soil of the road.] Neither is this an action by the freeholder. [JERVIS, C. J.—The defendant is a wrongdoer.] The question is, whether the defendant has obstructed a right of way which the plaintiffs lawfully had. The right originally ceded to the plaintiffs, was, a right of access to the land purchased by them, through two gates, one at the upper the other at the lower end of the road in question. These two gates the plaintiffs have removed, and have built a wall along the whole frontage of their land, with two gates therein, both being at different spots from those on which the old gates stood. The right of way which was granted to the plaintiffs could only be exercised by them according to the terms of the grant,—through the old gates, or through new ones erected at the same spots. By abandoning the old modes of access to their land, they at least suspended their right of way. [CRESSWELL, J.—Suppose the plaintiffs had built up the old ways, and had not opened new ones, would

that justify the defendant in doing what he *has done ?] The using [*54 the new ways would probably be stronger evidence of abandonment. [CRESSWELL, J.—There was no evidence of abandonment at the trial.] No. The point was reserved. In *Henning v. Burnet*, the plaintiff, being the owner in fee of some land partly built upon, conveyed to the defendant a dwelling-house, with a coach-house and stable at the back thereof, and a field, *together with all ways, waters, easements, &c., to the dwelling-house and field belonging, or usually enjoyed therewith, with free liberty of ingress, egress, and regress for the defendant with cattle and carriages over the carriage-road and foot-path leading to the said dwelling-houses, coach-houses, and stables in the occupation of F. N. and the defendant.* Previous to the time of this conveyance, a private road was used for carriages, cattle, &c., from the turnpike road to the defendant's coach-house and stable, and field, from which road there was a gate into the field. The defendant afterwards pulled down his coach-house and stable, and built a wall across the private road, near their former site (enclosing a portion of the road which had been conveyed to him in fee), and he also opened a gate at the further corner of his field into the private carriage-road, which he used instead of the former gate, and drove cattle and carriages along the road into the field and back again. And it was held, that the defendant was liable in trespass, inasmuch as the grant of all ways to the field belonging or usually enjoyed therewith, extended only to the user of the way as it existed at the time of the grant, through the then existing gate, and the express grant was of a right of way to the dwelling-house, coach-house, and stable only. It is extremely difficult to discover any distinction between that case and the present. *Allan v. Gomme* is also expressly in point. There, in trespass quare clausum fregit, it appeared that B., being owner of the locus in quo, and also of certain other land, with houses, and a *stable, loft, and chaise-house, conveyed to A. a part of the premises, consisting of a house and land comprehending the locus in [*55 quo, reserving to himself, his heirs, &c., occupiers for the time being of a messuage (not conveyed) *a right of way and passage over the locus in quo to a stable and loft over the same, and the space or opening under the loft and then used as a wood-house, and to the chaise-house standing on the side of the locus in quo (the stable, loft, wood-house, and chaise-house not being conveyed), and also the use of the locus in quo in common with A., his heirs, &c., and their tenants for the time being; it being expressed to be the intent of the parties that the whole of the yard comprehending the locus in quo should lie open and undivided, as the same then was, and be used in common by the occupiers of both messuages as the tenants thereof had been accustomed theretofore to use them.* Afterwards B. built a cottage on the site of the opening under the loft: and it was held,—that the reservation of the use of the locus in quo did not authorize B. to use it for the

purpose of passing to the cottage,—that the reservation of the *right of way* was not limited to a right of passage to the space *so long as it was used as a wood-house*, but gave a way generally to the space so described, while it was open,—but that B. was not entitled to use that way for the purpose of passing to the cottage. Lord Denman, in giving the judgment of the court, takes a general view of the law as to easements, and refers to *Luttrell's Case*, 4 Co. Rep. 86 a, where, he observes, “The court appears to have put the case on whether the alteration of the thing in respect of which the right was claimed, was of the substance and not merely of the quality of the thing. Now, the alteration of a piece of vacant ground into a cottage is certainly an alteration of the substance, and not merely of the quality.” So, here, there is a change in the substance of the right. In *Renshaw v. Bean*,
*56] 21 Law Journ., *N. S., Q. B. 219, where a party who had a right to the access of light and air through certain ancient windows, made an alteration in their size so as to exceed the limits of his ancient right, it was doubted whether he did not thereby lose his right entirely. In *Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16), *Littledale, J.*, draws the distinction between lights and ways. “According to the present rule of law,” he says, “a man may acquire a right of way, or a right of common (except, indeed, common appendant), upon the land of another, by enjoyment. After twenty years’ adverse enjoyment, the law presumes a grant made before the user commenced, by some person who had power to grant. But, if the party who has acquired the right by grant ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right. It is said, however, that, as he can only acquire the right by twenty years’ enjoyment, it ought not to be lost without disuse for the same period; and that, as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user, to raise a presumption of a release. And this reasoning, perhaps, may apply to a right of common or of way. But there is a material difference between the mode of acquiring such rights and a right to light and air. The latter is acquired by mere occupancy; the former can only be acquired by user, accompanied with the consent of the owner of the land; for, a way over the lands of another can only be lawfully used, in the first instance, with the consent, express or implied, of the owner. A party using the way without such consent would be a wrongdoer; but, when such a user, without interruption, has continued for twenty years, the consent of the owner is not only implied during that period, but a grant of the easement is presumed to have taken place before the user com-
*57] menced. The consent of the owner *of the land was necessary, however, to make the user of the way (from which the presumption of the grant is to arise) lawful in the first instance. But it is

otherwise as to light and air. Every man on his own land has a right to all the light and air which will come to him; and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He, therefore, begins to acquire the right to the enjoyment of the light by mere occupancy." [CRESSWELL, J.—In stopping up lights, the party is using his own land. Here, the acts complained of are done by the defendant upon the land of another.]

JERVIS, C. J.—I am of opinion that this rule must be discharged. It is not necessary to determine what is the strict construction of the indenture of the 29th of November, 1836, though I for one entertain no doubt whatever upon it, because I think the reference to the plan or map does not mean that the ways shall be used only through the *gates* described in the plan, but that the grantees shall have liberty to use the *road* described in the plan for the purpose of going to or returning from any part of the lands which were the subject of the conveyance. The *gates* formed no part of the road as described; they merely lead to the road. But, in truth, it is unnecessary to determine that. This is not like the case of *Henning v. Burnet*, 8 Exch. 187,† where the grant was of a right of way to a particular place, for a particular and limited purpose. If I grant a man a way to a cottage which consists of one room, I know the extent of the liberty I grant; and my grant would not justify the grantee in claiming to use the way to gain access to a town he might build at the extremity of it. Here, the grant is general,—to use the road for the purpose of *going to or returning from the land conveyed, or any part thereof: it is not defined, as in the case referred [*58 to. But, whether the plaintiffs had or had not a right to alter the position of the gates as described in the plan, it is quite clear that they had a right of way along the road in question to the upper end of the land; and the defendant having obstructed that way by the excavation of the road in the manner stated, the plaintiffs have, it is conceded, a right of action, unless that right is affected by the doctrine of suspension,—which I must confess I do not understand. The plaintiffs have a right of way to the upper end of their land. Suppose they do not choose to have a gate at all, but build up a wall along the whole line, why may they not say, when we want to exercise our right we will knock down our wall? I think the plaintiffs have done nothing to defeat the right granted to them by Woolley; and that, whether there were two gates or only one, the defendant had no right to obstruct the way in the manner he has done.

CRESSWELL, J.—I am of the same opinion. It appears to me that the grant of the way as described in the indenture and delineated in the map or plan annexed thereto, gives the plaintiffs the free use of the whole and every part of the way. There is nothing to pre-

vent them from stopping short at any intermediate part of the road. The doctrine of suspension suggested by Mr. *Creasey*, is, I must confess, perfectly new to me.

WILLIAMS, J.—I am entirely of the same opinion. The grant of the roads and ways “as the same roads and ways are described in the map or plan,” does not mean to refer to the plan for the *gates*. It does not mean that the grantees shall have merely a road or way through the gates or either of them; but that they shall have the use of the ways *59] thereof. This, as it seems to me, is rendered quite clear by the words contained in the grant, “jointly or in common with others the person or persons for the time being entitled to the like liberties, licenses, and authorities respectively.” The generality of the description goes far to convince me that the plaintiffs were to have the enjoyment of the road in question, without reference to the means of access. It is unnecessary to determine the other point: but I cannot see any ground for saying that the right is either gone or suspended. I therefore concur with my Lord and my Brother Cresswell in thinking that this rule should be discharged.

CROWDER, J., not having heard the whole of the argument, gave no opinion. Rule discharged.

That the grantee of a right of way *Kirkham v. Sharp*, 1 Wharton, 323; appurtenant to land cannot use the way *Jamison v. M'Credy*, 5 Watts & Serg. to pass to other land different from that 129; *Case of Lasaretto Road*, 1 Ashmead, 417; *French v. Martin*, 4 Fosson v. Bioren, 1 Serg. & Rawle, 227; *ter*, 440.

WILLIAM ALEXANDER and THOMAS ALEXANDER v.
GEORGE ALEXANDER. May 5.

Testatrix devised as follows:—“I give and devise unto my son Thomas all that my freehold estate, situate, &c., to hold the same unto my said son Thomas for and during the term of his natural life; and, from and immediately after his decease, I give and devise the same unto the second son of the body of my said son Thomas, lawfully begotten, on his attaining the age of twenty-one years: but, in default of there being a second son of the body of my said son Thomas,” then over.

The testatrix died in 1813. Her son, the tenant for life, had four sons,—the first, Christopher, was born in 1816, and died in 1822,—the second, *George*, was born in 1820, and died in 1827,—the third, *William*, was born in 1824, and attained his age of twenty-one in the lifetime of his father, whom he survived,—the fourth, Thomas, was born in 1832, and also attained twenty-one:—

Held, that *George*, the second born son of Thomas, the tenant for life, took a contingent remainder expectant on the determination of the life-estate of his father; and consequently that, he having died under twenty-one and intestate, *William* became entitled to the estate as his heir-at-law.

THIS was an action of ejectment brought to recover a cottage, barn,

and nine acres of land situate in the parish of Vertram's Dean, in the county of *Southampton. The action was commenced by writ of ejectment, and the above-named defendant was admitted to appear [*60 thereto and defend as landlord pursuant to the provisions of The Common Law Procedure Act, 1852,—15 & 16 Vict. c. 76; and the following case was, under an order of Maule, J., stated for the opinion of the court:—

Mary Alexander, at the date of her will, and at the time of her death, was seised of the inheritance in fee-simple in possession of the land and premises sought to be recovered in this action; and, being so seised, she duly made and published her last will and testament in writing, dated the 18th of October, 1813, duly executed and attested to pass real estate, and which will was as follows:—

“This is the last will and testament of me, Mary Alexander, of the parish of Hurstborne Tarrant, in the county of Southampton, widow: First, I will and direct that all my just debts and funeral expenses be paid by my executors hereinafter named, as soon as conveniently may be after my decease; and to and with the payment of the same I hereby subject and charge all those my two messuages or tenements and premises being Nos. 4 & 5, situate and being in Edward Street, in the City of Westminster, and hereinafter given and devised by this my will to my youngest son Christopher Alexander, except 16*l.* hereinafter charged upon my estate at Vertram's Dean, and given by this my will to my son Thomas Alexander: I give and devise unto my said son Thomas Alexander all that my freehold estate situate in the parish of Vertram's Dean, in the said county of Southampton, and now in the occupation of Thomas Mosdell, To hold the same unto my said son Thomas for and during the term of his natural life; and, from and immediately after his decease, I give and devise the same unto *the second son* of the body of my said son Thomas, lawfully begotten, on his attaining the age of twenty-one *years; but, in default of there being a second son [*61 of the body of my said son Thomas, then I give and devise the same unto the second son of the body of my son Christopher, lawfully begotten, on his attaining the age of twenty-one years; but, in default of there being a second son of the body of my said son Christopher, then I give and devise the same unto the second daughter of my said son Christopher, lawfully begotten, on her attaining the age of twenty-one years; but, in default of there being a second daughter of the body of my said son Christopher, then I give and devise the same unto the right heirs of my said son Thomas for ever, but subject to and charged and chargeable with the payment of 16*l.* towards discharging my just debts and funeral expenses, and also subject to the yearly payment of 10*l.* 10*s.* unto my daughter Mary Ann Alexander during all such time as she shall remain single and unmarried, by two equal payments, that is to say, the 5th of April, and 10th of October in every year, the first

payment to begin and commence on the first of the said days of payment as shall next happen after my decease: I give, devise, and bequeath unto my said son Christopher all those my two messuages or tenements and premises, with the appurtenances, situate and being in Edward Street, in the city of Westminster aforesaid, To hold unto my said son Christopher, his heirs, executors, administrators, and assigns, for ever; but subject as aforesaid: I give and bequeath unto my son George Alexander the bed and furniture on which I sleep, the clock, dining-table, brewing-furnace, and a half a dozen silver spoons marked G. M. A., upon his marriage or settling in business, till which time the same to be and remain with my said daughter Mary Ann for her use: I give and bequeath to my daughter Susanna Purver and Mary Ann Alexander all my wearing apparel, to be equally divided between them: Also I give *62] unto my said daughter *Susanna a mahogany bureau: And all the rest, residue, and remainder of my household goods and furniture, plate, linen, china, and all other my personal estate not before disposed of, I give and bequeath the same, and every part thereof, unto my said daughter Mary Ann Alexander, her executors, administrators, and assigns, absolutely: And I do hereby nominate, constitute, and appoint George Alexander, of, &c., and William Alexander, of, &c., executors of this my will, and guardians of my said son Christopher during his minority, who I hereby authorize and empower to receive the rents and profits of my said two houses above given to my said son Christopher, until he shall attain the age of twenty-one years, and from time to time to place out the same at interest and advantage: And I do hereby revoke and make void all and every other will or wills at any time heretofore by me made, and do declare this to be my last will and testament. In witness, &c."

The said Mary Alexander, the testatrix, died in the month of December, 1813, without having altered or revoked her said will, leaving her son, the said Thomas Alexander, her heir-at-law; and, upon her death, her son the said Thomas Alexander entered into possession of the said land and premises, or the receipt of the rents and profits thereof, and continued in such possession or receipt, under the said devise to him, until the time of his death, which took place on the 6th of August, 1852. He died intestate.

The said Thomas Alexander, the tenant for life, married Betsey Whitehorn in the year 1812, and had by his said wife four sons and several daughters: the first son, named Christopher Richard, was born on the 22d of August, 1816, and he died in the month of August, 1822, in the lifetime of his father, without attaining twenty-one years of age: *the second son, named George, was born on the 8th of October, 1820,* *63] *and he died in the *month of February, 1827, in the lifetime of his father, without attaining twenty-one years of age:* the third son, William, one of the plaintiffs, was born on the 26th of June, 1824,

and he attained the age of twenty-one years in the lifetime of his father: and the fourth son, Thomas, was born on the 25th of July, 1832, and is the other plaintiff above named, and has attained the age of twenty-one years since the death of his said father.

The said William Alexander, the plaintiff, is the heir of George, the second son of Thomas Alexander, the tenant for life: and he was likewise the heir of the said Thomas Alexander, the tenant for life, at the time of his decease.

George Alexander, the defendant, is the second son lawfully begotten of the said Christopher Alexander, the second son of the testatrix.

The defendant attained his age of twenty-one years on the 14th of December, 1853, after the death of the said Thomas Alexander, the tenant for life; and, upon the death of the said tenant for life, he the defendant claimed to be entitled to, and has since received, the rents and profits of the said land and premises.

The question for the opinion of the court, is, whether either of the said plaintiffs is entitled to recover possession of the said land and premises. If the court shall be of opinion that either of the said plaintiffs is so entitled, then judgment is to be entered for such plaintiff, accordingly. But, if the court should be of opinion that neither of the said plaintiffs is so entitled, then judgment is to be entered for the defendant.

Rudall, for the plaintiffs.(a)—The main question is, *who was [64 the person to take under the devise to "the second son of the body" of the testatrix's son Thomas. The case shows that Thomas Alexander, the tenant for life, had had no son at the date of the will or the death of the testatrix; and that he afterwards had two sons, Christopher Richard, and George, both of whom died under the age of twenty-one, and a son William who lived to attain that age. It is submitted, that, under the devise in question, George, the second son of Thomas Alexander, the son of the testatrix, took a fee,—not vested, but contingent on his attaining the age of twenty-one; and that, in consequence of the failure of that limitation, the whole will failed, and William, the third son, became entitled as heir general of the family.

(a) The points marked for argument on the part of the plaintiffs, were,—“1. That, under the devise to the second son of the body of Thomas Alexander, the tenant for life, the devised estate vested in George Alexander, his second son, upon his birth, in fee, and upon his death under age descended to the plaintiff William Alexander, as his heir-at-law: or

“2. If the devised estate did not vest in George, but was a contingent remainder which failed by reason of his being under twenty-one when the estate for life determined, then that, as Thomas Alexander, the tenant for life, had no son at his death who had attained twenty-one, and Christopher, his brother, had no son or daughter who had attained that age, and the several estates created by the will (which were all in fee) were alternatives or substitutions one for the other, the last alternative devise to the right heir of Thomas, the tenant for life, took effect, and the plaintiff William Alexander is now entitled as such right heir: or

“3. That, if the limitations of the will subsequent to the estate for life of Thomas Alexander were all contingent, they failed of effect, and the inheritance descended to the testatrix's heir-at-law, Thomas Alexander, and upon his death intestate, descended to the plaintiff, William Alexander, as his heir-at-law, or the heir-at-law of the testatrix.”

The subsequent limitations were all contingent remainders, to take effect only in the event of there being no second son of the body of Thomas. *Trafford v. Ashton*, 2 Vern. 660, shows that a devise to a second son is not to be defeated by his afterwards becoming an eldest son, but the *65] second born son is the person to take. In *Driver v. Frank*, 3 M. & Selw. 25, the testatrix devised all her real estates to the use of B. F., the husband of her niece, for life, and, from and immediately after his decease, then to and to the use of the second, third, fourth, and all and every other the son and sons of the body of B. F. by his said wife (except the first or eldest son) severally and successively and in remainder one after another, and of the several heirs male of the body of every such son and sons (except the said first or eldest son); and, for default of such issue, to the use of F. S., youngest son of another niece of the testatrix, for life, &c.: and it was held, that the remainder to the sons of B. F. (who had no children at the date of the will) was not a contingent remainder to such son as should be the second son of B. F. at the death of B. F., nor a vested remainder in the second or other son of B. F., liable to be divested by his becoming the first or eldest by the death of his elder brother in the lifetime of B. F., but *a vested indefeasible remainder in the second or other son of B. F. who should be born living an elder*; and therefore, B. F. having had four sons, of whom the second and third and second and fourth were in existence at the same time, but all except the fourth died in the lifetime of B. F. without issue,—it was held that the surviving son was entitled under the devise. That case has always been considered a leading authority. It was followed in *King v. Bennett*, 4 M. & W. 36.† In *Hawkins v. Hawkins*, 3 M. & Scott, 322 (E. C. L. R. vol. 30), 9 Bingh. 765 (E. C. L. R. vol. 23), by a deed of settlement made in 1756, lands were settled by T. H. in tail male to the use of such person as at the time of the decease of T. H. should be the second son then living of T. H. and A. H.; and, for default of such issue, to the use of the third, fourth, fifth, sixth, and all and every other son and sons, other than and except the eldest son for the time being of T. H. and A. H., who should by *66] the death of such second, third, fourth, or other son, *without issue, become a second son; and for default of such issue as aforesaid, and in case there should be two or more daughters of T. H. and A. H., then to the use of such daughters and their heirs, as tenants in common; but, in case there should be only one son of T. H. and A. H., then to the use of the eldest or only son; and, for default of all such issue, to the use of T. H. in fee. T. H., the settlor, died in 1766, leaving four sons,—Philip, who died in 1770, an infant, and without issue,—Christopher, who died in 1829, without issue,—Thomas, who died in 1788, without issue,—and John, who survived: it was held, that, under the circumstances, John, the fourth son of the settlor, took an estate in tail general in the settled estates.

The next question is, what estate George took,—a life-estate or a fee? or what estate he would have taken if it were a vested estate? The authorities upon that subject will be found collected in *Doe d. Pottow v. Fricker*, 6 Exch. 510,† and clearly show that he took a fee; and, as nothing was given to him until the age of twenty-one, he took a contingent estate in fee,—*Festing v. Allen*, 12 M. & W. 279,† *Doe d. Rew v. Lucraft*, 1 M. & Scott, 573 (E. C. L. R. vol. 28), 8 Bing. 386 (E. C. L. R. vol. 21). In *Festing v. Allen*, a testator, seised of certain freehold estates, devised them to trustees, to the use of his granddaughter, M. H. J., for life, “and, from and after her decease, to the use of all and every the child or children of her the said M. H. J. *who should attain the age of twenty-one years*,” to hold as tenants in common, and not as joint-tenants, and to their several and respective heirs, &c.; “and, for want of any such issue,” he directed that his trustees should stand possessed thereof, in trust as to one moiety to permit A. J., the wife of his grandson T. R. B. J., to receive the rents and profits during her life for the maintenance and education of all and every the child or children of his said grandson T. R. B. J., lawfully begotten, [*67 *who should *attain the age of twenty-one years*, to hold as tenants in common, and not as joint-tenants, and to their several and respective heirs, &c.; and, as to the other moiety, to stand possessed thereof to the use of S. R. for life, and, from and after her decease, to the use of all and every the child or children of the said S. R., lawfully begotten, *who should attain the age of twenty-one years*, to hold as tenants in common in fee. The testator died in 1824, leaving him surviving his granddaughter the said M. H. J., the said A. J., the wife of the said T. R. B. J., who had four children, and the said S. R., who had seven children. M. H. J. married in 1825, and died in 1833, leaving three children, who were infants at the time of her death. Some of the children of A. J. and S. R. attained the age of twenty-one. It was held, that M. H. J. was tenant for life, with a contingent remainder in fee to such of her children as should attain twenty-one; and, as no child had attained twenty-one when the particular estate determined by her death, the remainder was necessarily divested, and the children took no interest in the estate devised: and that the limitations over were divested by the same event, and that the estate vested in the heir-at-law. Rolfe, B., in giving the reasons upon which the certificate in that case was founded, says: “The gift is not to the children of Mrs. Festing, but to the children who shall attain twenty-one, and no one who has not attained his age of twenty-one years is an object of the testator’s bounty, any more than a person who is not a child of Mrs. Festing. Even if there were no authority establishing this to be a substantial and not an imaginary distinction, still we should not feel inclined to extend the doctrine of *Doe d. Hunt v. Moore*, 14 East, 601, and *Phipps v. Ackers*, 3 Clark & Fin. 703, to cases not

precisely similar. But, in fact, the distinction to which we have adverted in a great measure forms the ground of the decision in the *68] case of *Duffield v. Duffield*, *3 Bligh. N. S. 20, in the House of Lords, and *Russell v. Buchanan*, 2 C. & M. 561,† in this court; and on this short ground our opinion is founded. We think that Mrs. Festing was tenant for life, with contingent remainders in fee to such of her children as should attain twenty-one, and, as no child had attained twenty-one when the particular estate determined by her death, the remainder was necessarily defeated. It is equally clear that all the other limitations were defeated by the same event, viz. the death of Mrs. Festing leaving several infant children, but no child who had then attained the age of twenty-one years; for, the limitations to take effect at her decease were all of them contingent remainders in fee, one or other of which was to take effect according to the events pointed out. If Mrs. Festing had left at her decease a child who had then attained the age of twenty-one years, her child or children would have taken absolutely, to the exclusion of all the other contingent remainders. If, on the other hand, there had at her decease been a failure of her child or children who should attain twenty-one, then the alternative limitations would have taken effect: but this did not happen, for, though she left no child of the age of twenty-one years, and therefore capable of taking under the devise in favour of her children, yet neither is it possible to say that there was at her decease, a failure of her issue who should attain the age of twenty-one years, for, she left three children, all or any of whom might and still may attain the prescribed age; so that the contingency on which alone the alternative limitations were to take effect had not happened when the particular estate determined, and those alternative limitations, all of which were clearly contingent remainders, were therefore defeated. On these short grounds, we think it clear that neither the infant children of Mrs. Festing, nor the parties who were to take the estate in case of her leaving no child *69] *who should attain twenty-one, take any interest whatever, but that on her death the whole estate and interest vested in the heir-at-law." It may be contended on the other side, that the limitation in question should be read,—“in case there should not be any such second son who shall attain the age of twenty-one years.” That, however, cannot be the true construction. In *Doe d. Rew v. Lucraft*, the testator devised as follows,—“I give and devise my reversion in the messuage in Aldgate unto A. C. and M. A. and their heirs, in trust, as to one moiety, for Nicholas Lucraft, his heirs, &c., and, as to the other moiety, in trust for such son of mine as shall first attain the age of twenty-one years, and for his heirs, &c. But, in case I shall depart this life without leaving a son, or, leaving such, none shall attain the age of twenty-one, then, as to the last-mentioned moiety, in trust for my daughter Jane Newton, &c. But, should I depart this life *without*

leaving issue, then I give and devise the entirety of the said messuage, &c., unto the said A. C. and M. A. and their heirs, in trust for the said Nicholas Lucraft, his heirs and assigns, for ever." The testator died leaving an only child, a daughter, who died at the age of four years: and it was held, that Nicholas Lucraft took a moiety only, and not the entirety, under the devise over. It was contended on the argument, that the words in the devise over, "*without leaving issue*," ought to be read, "without leaving issue who should attain the age of twenty-one." But the Lord Chief Justice repudiated that construction. He says,—after adverting to the terms of the devise over,—“Now, what is the true construction of this expression,—‘Should I depart this life without leaving issue?’ The natural meaning of the words, is, either a general failure of issue, in which case the devise over would be too remote, and consequently would be void; or they may be taken to contemplate the case of the testator dying leaving no *child or children, in which case the event upon which the devise over was [*70 to depend never happened, for, the testator left a daughter living at the time of his death. But it is contended on the part of the defendant, that these words will also admit of a third interpretation, and that the will may be read as if the words had been thus,—‘Should I depart this life without leaving *such issue as before mentioned*,’—that is, not only without leaving a son or a daughter, but accompanied by the restriction before recited in the will, viz. a son or a daughter who shall live to attain the age of twenty-one years. Cases have been cited to show that the word issue may be construed to mean such issue as the testator had before referred to: but no case can be found wherein the principle has been carried further: it has never been held that the term may also include any restrictions which may have accompanied it in any former part of the will. Admitting that we may read the clause thus,—‘Without leaving a son or daughter;’ what authority have we to insert a restriction,—‘who shall live to attain the age of twenty-one years?’ We clearly are not at liberty to insert any such restriction.” These two cases are distinct authorities to show that all the devises over here failed to take effect; and that William Alexander, the third son of Thomas,—Christopher and George having both died under twenty-one, and intestate,—is entitled to the judgment of the court.

Another view may be presented. Upon the authority of *Festing v. Allen*, these limitations were all contingent, and failed for want of an estate of freehold to support them. *Quâcunque viâ*, therefore, the plaintiff William Alexander is entitled to succeed. [WILLIAMS, J.—Are there not cases which hold that that which under certain circumstances is held to be a contingent remainder, may be otherwise if the state of things requires it to be so construed?] Where a limitation can be construed to *be a contingent remainder, it is never construed to be [*71 an executory demise.

Fordham, contra.—The legal estate in the premises sought to be recovered by this action, did not by the will of Mary Alexander vest in either of the plaintiffs. It may be conceded that, by "the second son of the body of my son Thomas," the testatrix meant the second son born, and not the second of those who should be living at the death of the tenant for life. But the question is, what estate did he take? It is submitted that he took a vested remainder in fee, subject to be divested in the event of his dying under twenty-one. The words "on his attaining the age of twenty-one years" constitute a condition subsequent, and not a condition precedent to the vesting of the estate. The words "on attaining," or "when he shall attain," or "if he shall attain" twenty-one, have invariably been so construed, unless a contrary intention is apparent: *Boraston's Case*, 3 Co. Rep. 19; *Edwards v. Hammond*, 3 Lev. 132; *Doe d. Hunt v. Moore*, 14 East, 601; *Brownfield v. Crowder*, 1 N. R. 313; *Snow v. Poulden*, 1 Keen, 186. And the circumstance of there being a gift over makes no difference. In *Attwater v. Attwater*, 18 Beavan, 330, the testator gave an estate to A., "to become his property *on attaining the age of twenty-five years*," with an injunction never to sell it out of the family; "but, if sold at all, it must be sold to one of his brothers:" and it was held, that the estate was vested, subject to be divested in case of A.'s death before he attained twenty-five; and that the restriction on alienation was inoperative. [CRESSWELL, J.—Was there any devise over there?] It does not appear from the report that there was. The Master of the Rolls (Sir John Romilly) says: "I think that this question is governed by the case of *Snow v. Poulden*, to which I was referred; and that the true *72] construction is that G. T. *Attwater takes a vested interest in the land devised, but liable to be divested in case he die under the age of twenty-five years." That shows that the form of the devise over cannot affect the construction. In *Riley v. Garnett*, 3 De Gex & S. 629, a devise unto and to the use of trustees, their heirs and assigns, upon trust to pay the rents and profits to a married woman for her separate use, for life; and, after her decease, in trust for all her children who who should attain twenty-one, or, being daughters, attain that age or marry, and their heirs and assigns for ever, as tenants in common,—was held to give vested estates to all her children as they came into existence, subject to be divested on their deaths under twenty-one, and (if daughters) unmarried. The true construction of this devise, it is submitted, is this,—devise to the testatrix's son Thomas for life, remainder to his second son in fee, with an executory devise over, in case such second son should die before the age of twenty-one, to the second son of Christopher Richard. There are authorities to show that this gift over may be construed as an executory devise. In *Fearne's Contingent Remainders*, 396, it is said, that, "even where there is a limitation after a devise in fee-simple, though such antecedent devise in fee be not

vested, but contingent, yet, if the ulterior limitation is limited so as to take effect in defeasance of the estate first devised, on an event subsequent to its becoming vested, it has been held to operate as an executory devise. Thus,—*Gulliver v. Wickett*, 1 Wills. 105,—where a testator devised lands to his wife for life, and, after her death, to such child as she was then supposed to be enceinte with, and to the heirs of such child for ever; provided, that, if such child as should happen to be born should die before the age of twenty-one years, leaving no issue of its body, the reversion should go over: the court held it to be a devise to the wife, remainder to the child in contingency in fee, *with a devise over, which they held a good executory devise, as [*73 it was to commence within twenty-one years after a life in being; and that, if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife; and that the number of contingencies was not material, if they were all to happen within a life in being, or a reasonable time after." This construction is further fortified by the judgment of Bayley, J., in *Doe d. Herbert v. Selby*, 2 B. & C. 926 (E. C. L. R. vol. 9), 4 D. & R. 608 (E. C. L. R. vol. 16). "If," says that learned judge, "a fee be given by way of vested limitation, but determinable, a remainder after that must be an executory devise; but, if a fee is limited in contingency, and upon failure of that the estate is given over, that is a contingency with a double aspect; and, if the estate vests in the one, it cannot in the other, —*Loddington v. Kime*, 3 Lev. 431. But it may happen that an estate may be devised over in either of two events; and that, in one event, the devise may operate as a contingent remainder, in the other as an executory devise. Thus, if George (the tenant for life) had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But, George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder." *Festing v. Allen* is distinguishable, inasmuch as there the estates were given to a class if they should attain the age of twenty-one; whereas, here, the estate is given to an individual on his attaining the age of twenty-one. [WILLIAMS, J.—*Doe d. Herbert v. Selby* was a good deal considered in a recent case in the Exchequer Chamber. In *Phipps v. Ackers*, 9 Clark & Fin. 588, it seems to have been taken for granted that words such as these would vest the estate. Tindal, C. J., delivering the opinion of the judges, there says: "The cases on this subject appear to be resolvable *into two classes,—first, those in which the courts have relied [*74 on the circumstance that the estate, prior to the attainment of the age of twenty-one, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle v. Whitby*, 1 Burr. 228, or for the benefit of some other persons to endure during the minority, as in *Boraston's Case*, 3 Rep. 19, and *Mansfield v. Dugard*, 1 Eq. Cas.

195,—and, secondly, those cases in which the estates are given over in the event of the devisee dying under twenty-one, as in *Edwards v. Hammond*, 8 Lev. 182, *Brownfield v. Crowder*, 1 N. R. 818, and *Doe d. Hunt v. Moore*, 14 East, 601. The first class of cases proceeds on the ground that the estate given to the devisee on his attaining twenty-one, is in fact only a remainder, taking effect in its natural order, on the determination of the preceding estates; and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainder-man is not to take until after the determination of the particular estates. The second class of cases goes on the principle that the subsequent gift over in the event of the devisee dying under twenty-one, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency. Whether the doctrine on which this second class of cases has rested was originally altogether satisfactory, is a point which we need not discuss. It is sufficient to say that it clearly has been established and recognised as a settled rule of construction, not only in the courts below, but also in your Lordships' House, and that rule appears to us clearly to govern the case put to us by your Lordships." Upon these authorities, it is *75] submitted, that, under the devise in question, George, *the second son of Thomas, took a vested estate in fee, with an executory devise over in the event of his dying under twenty-one; and that, since he never did attain the age of twenty-one, the plaintiffs in this ejectment cannot succeed, either as the right heirs of the tenant for life, or of George Alexander, or of the testatrix; but that the estate vests in the defendant as the second son of Christopher Richard, the eldest son of Thomas the tenant for life.

Rudall, in reply.—The authority of the cases cited on the other side is not denied, but only their application to the case now before the court. If this case were governed by *Boraston's Case*, George, the second son of Thomas, took a vested fee-simple, which was never divested. But, in truth, that was a totally different question from this, which arises upon a devise to a person on his attaining the age of twenty-one; and there is no devise over in the event of his dying before he attains that age. In *Attwater v. Attwater*, there must have been a devise over, though it is not stated in the report: and it is palpable that the Master of the Rolls did not mean to overrule *Festing v. Allen*, and the cases upon which it was founded, or *Doe d. Rew v. Lucraft*. Where an estate is clearly a contingent remainder, as here, you cannot in any event hold it, or the devises depending upon it, to be executory devises. [*Fordham* referred to *James v. Lord Wynford*, 1 Smale & G. 40.] *James v. Lord Wynford* was founded upon *Boras-*

ton's Case. Upon this point, *Doe d. Rew v. Lucraft* is on all fours with the present case. Cur. adv. vult.

JERVIS, C. J.—The question in this case turns upon the construction of a few words in the will of Mary Alexander. The devise is as follows:—"I give and devise unto my said son Thomas Alexander all that my *freehold estate, situate, &c., to hold the same unto my [*76 said son Thomas for and during the term of his natural life; and, from and immediately after his decease, I give and devise the same unto *the second son* of the body of my said son Thomas, lawfully begotten, *on his attaining the age of twenty-one years*: but, in default of there being a second son of the body of my said son Thomas, then I give and devise the same unto the second son of the body of my son Christopher," &c. It was admitted, in the course of the argument, that George, the second son of the testatrix's son Thomas, who was born on the 8th of October, 1820, and died in the lifetime of his father, without having attained the age of twenty-one, satisfied the description of the person who was to take the estate: but the question argued was, what was the nature and character of the estate which he took. It was contended, on behalf of William Alexander,—the claim of the other plaintiff not being urged before us,—that George, the second son of Thomas, took a contingent remainder expectant on the determination of the life-estate of his father. On the other hand, it was insisted, on behalf of the defendant,—who was the second son of Christopher Alexander, the testatrix's second son, and who attained his age of twenty-one years after the death of the tenant for life Thomas Alexander,—that George, under the devise in question, took an estate in fee, with an executory devise over, in the event of his dying under twenty-one. The question is, which of these is the right construction? If the former, the plaintiff William Alexander will be entitled to our judgment: if the latter, he will not be entitled. Upon a careful consideration of the authorities, we are of opinion that the plaintiff's is the correct construction. In truth, the question is determined by two authorities which were cited upon the argument, viz., *Festing v. Allen*, 12 M. & W. 279,† and *Doe d. Rew v. Lucraft*, 1 M. & Scott, 573 (E. C. L. R. vol. 28), [*77 8 *Bingh. 386 (E. C. L. R. vol. 21). If we could read the will,—or that part of it upon which the question turns,—as saying "I give and devise the same unto the second son of the body of my said son Thomas, lawfully begotten, on his attaining the age of twenty-one years, but, in default of there being a second son who shall attain the said age of twenty-one years," then over, the construction contended for on the part of the defendant would be the correct construction. But, in the case of *Doe d. Rew v. Lucraft*, under precisely similar circumstances,—indeed stronger; for, there the word "such" might have been supposed to carry back the description to the persons before named,—the court determined that the contingency upon

which the defendant was to take the whole estate did not happen; for, that the testator only intended the estate to go over to the defendant in an event which had not happened, viz., the event of his dying without leaving *any* issue. The result is, that, upon the authority of these decisions, we hold that the plaintiff William Alexander is entitled to the judgment of the court. Judgment for the plaintiff.

Ex parte DAKINS, In re SWAN v. DAKINS. April 17.

A "priest in ordinary of Her Majesty's chapels royal" is privileged from arrest on process of the county court, under the 8 & 9 Vict. c. 95, s. 99, for non-attendance on a judgment summons,—such process being in the nature of *execution*, and not *merely* process of contempt. The proper mode of obtaining his discharge in such case, is, not by writ of privilege, but by habeas corpus from one of the superior courts (upon affidavits showing his privilege), or by application to the judge of the county court.

BYLES, Serjt., moved for the discharge upon a habeas corpus of the Rev. John Horsley Dakins, who was detained in the custody of the keeper of the county gaol of Derbyshire under a warrant of commitment of the judge of the Derbyshire county court, on the ground that the applicant was privileged from arrest, as being one of the priests in ordinary of Her Majesty's chapels royal. It appeared that Dr. Dakins was summoned to the county court for a debt, and judgment obtained against him with an award of payment forthwith. The money not having been paid, the plaintiff obtained a judgment summons, which was served personally upon Dr. Dakins; and, for his non-appearance thereto, the judge of the county court made an order for his commitment to the county gaol for thirty-five days, or until he should be discharged by due course of law, under which he was arrested on the 27th of March, and lodged in the gaol at Derby. Dr. Dakins on the 5th instant obtained a judge's order for a habeas corpus, under which he was brought up before Crompton, J., at Chambers, when that learned judge referred the matter to the court.

Where a party is improperly restrained, a habeas corpus is the proper remedy: *Fenner v. Tait*, 1 C. M. & R. 584.† [*Milward*.—It may at once be conceded, that, if this had been the case of an arrest under a ca. sa. from one of the superior courts, the defendant would be entitled to his privilege: that has been already decided in his favour in *Harvey v. Dakins*, 3 Exch. 266.† JERVIS, C. J.—There are two points,—first, whether the privilege extends to entitle this gentleman to his discharge from process of the county court,—secondly, whether, this being a commitment in the nature of contempt, the application should not have been made in the county court.] The order of commitment of the county court is not process of contempt, properly so called, but *limited execution*. The question turns upon the construction of two or three sections of the county court act of 9 & 10 Vict. c. 95.

The 99th section, which gives the judge power to commit, enacts, that, "if the party so summoned,"—that is, upon a judgment summons under s. 98,—“shall not attend as required by such summons, and shall not allege a sufficient excuse for not attending,—or shall, if attending, refuse to be sworn, or to disclose *any of the things aforesaid (s. 98), or if he shall not make an- [79
swer touching the same to the satisfaction of such judge,—or if it shall appear to such judge, either by the examination of the party, or by any other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust,—or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same,—or shall have made or caused to be made any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them, or if it shall appear to the satisfaction of the judge of the said court that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt or damages or costs so recovered against him, either altogether or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided,—it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident, or to any prison which shall be provided as the prison of the court, for any period not exceeding forty days.” The 103d section enacts “that no imprisonment under this act shall in any wise operate as a satisfaction or extinguishment of the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being anew summoned and imprisoned for any new fraud or other default *rendering him liable to be imprisoned under this act, or deprive [80
the plaintiff of any right to take out execution against the goods and chattels of the defendant, in the same manner as if such imprisonment had not taken place.” And section 110 enacts “that any person imprisoned under this act, who shall have paid or satisfied the debt or demand, or the instalments thereof payable, and costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining such order, and all subsequent costs, shall be discharged out of custody, upon the certificate of such payment or satisfaction, signed by the clerk of the court, *by leave of the judge* of the court in which the order of imprisonment was made.” This matter underwent considerable discussion in this court in *Ex parte Kinning*, 4 C. B. 507

(E. C. L. R. vol. 56), where the warrant was founded upon the 8 & 9 Vict. c. 127, s. 1; and also in the same case, in the Queen's Bench,—Kinning's Case, 10 Q. B. 730 (E. C. L. R. vol. 59). One question that arose in that case, was, whether the order of commitment was in *pænam*. Patteson, J., in the course of the argument, asks, "Is this proceeding by way of punishment? By s. 3,^(a) it is provided, that, upon payment of the debt, the debtor shall by leave of the judge be discharged out of custody. Imprisonment in execution of judgments for small debts had been recently done away with. Probably the change was thought inexpedient in some measure; and this act was intended as a partial restoration of the old law. I had recently to consider the first section, in a case argued before me at Chambers by Mr. Maynard. One of the Queen's servants had been summoned before the Bankruptcy Court. He did not appear to the summons; and that court pronounced him to be in contempt, and committed him. He was brought before me by habeas corpus: I thought the process prescribed by the act was by way of execution, and not of punishment, and discharged him." [JERVIS, C. J.—I attended as Attorney-General before Mr. Justice Patteson upon that occasion, and my Brother Crompton was with me. I remember the learned judge took time to consider, and delivered a very elaborate judgment. It was not, however, urged there by Mr. Maynard that this was a commitment in the nature of a contempt.] In *Ex parte Foulkes*, 15 M. & W. 612,[†] where a debtor was committed for not appearing to a summons under this section, Alderson, B., in his judgment, observed that "the intention of the legislature was, to give a limited *ca. sa.* in all cases where the amount of the judgment debt did not exceed 20*l.*" Lord Denman, in giving judgment in Kinning's Case, says, "I agree with my brother Alderson, that the commitment is a limited *ca. sa.*, the term of imprisonment being subject to reduction if the judge, on subsequent information, should think fit to interpose. I am quite aware of the importance of so construing a statute as not to infringe on liberty. But, in cases of this kind, I apprehend even a greater evil on the other side, in the enormous multiplication of petty process, rendering the aid of an attorney necessary at every turn of every trifling cause, and letting in the danger of endless vexation and expense. I think that the intention was, that the judge who makes the order for payment by instalments, should then determine judicially whether, in case of default, a limited *ca. sa.*, under which the debtor might be imprisoned for forty days, should issue." And Patteson, J., though he objected to the phrase "limited *ca. sa.*," held that the process was *in the nature of a ca. sa.*, and was not process for contempt. It is clear, therefore, that this order of commitment, by whatever name it may be called, is civil process. It by no means follows, however, that the defendant's privilege would not avail him, even if it is strictly process of contempt.

(a) Which is similar to s. 110 of the act now under consideration.

[JERVIS, C. J.—If it is for contempt, should you not go to the court whence the party was committed? Another court cannot judge of the contempt: *Stockdale v. Hansard*, 4 Jurist, 70.(a)] It is not strictly a commitment for contempt, where the alleged contempt is substantially the non-payment of money. The court will not grant an attachment against a peer (*Walker v. The Earl of Grosvenor*, 7 T. R. 171) or a member of parliament (*Catmur v. Sir E. Knatchbull*, 7 T. R. 448) for non-payment of money pursuant to an award. This, like that, is a mere ancillary mode of compelling payment of money. [JERVIS, C. J.—It is by no means matter of right to discharge a party upon a habeas corpus, even in a clear case of privilege. The proper course of proceeding is said to be, by writ of privilege; though I believe no man living ever saw such a writ: *Leslie v. Disney*, 1 C. M. & R. 578,† 5 Tyrwh. 181; *Dyer v. Disney*, 16 M. & W. 312.†] Many precedents of writs of privilege are to be found in Rastell's Entries, title *Privilege*, but none of them apply to this particular case. There is also a modern precedent of a writ of privilege in a case of *In re Thompson*, 2 M. & W. 645.† [JERVIS, C. J.—That was out of the equity side of the Exchequer.] This is not a case for a writ of privilege, properly so called, but for a habeas corpus; Vin. Abr., *Privilege* (B.); which is of common right wherever a man is unlawfully in custody. [JERVIS, C. J.—Should not the application be addressed to the court out of which the process issued? Suppose a ca. sa. issued out of this court, could the party arrested under it apply for a habeas corpus to the Court of Exchequer?] Probably [*88 *not; but we are here dealing with the process of an inferior court. [CRESSWELL, J.—The inferior court could take no cognisance of the privilege until brought to its notice. The warrant, therefore, was not irregular. The judge of the county court surely could deal with the matter.] It may be that the defendant might have applied to the county court. But, as he is now before this court upon the habeas corpus, the court will not send him back to the inferior court, if they see that he is improperly in custody.

The 67th section of the 9 & 10 Vict. c. 95, and the 18th section of the 12 & 13 Vict. c. 101, will be relied on to show that no privilege is to avail against process of the county court. But those enactments had a totally different object in view; their object was to oust attorneys of their privilege of being sued only in their own courts.

Milward showed cause.—The 67th section of the 9 & 10 Vict. c. 95, enacted that no privilege, except as thereafter excepted, should be allowed to any person to exempt him from the jurisdiction of any court holden under that act. This being found insufficient to deprive attorneys of privilege, the 12 & 13 Vict. c. 101, s. 18, enacted "that no privilege shall be allowed to any attorney, solicitor, or other person,

(a) S. C. nom. *The Queen v. Gossett*, 3 P. & D. 349; S. C. nom. *The Queen v. Evans*, 8 Dowl. P. C. 451; S. C. nom. *In re Middlesex (Sheriff)*, 11 Ad. & E. 273 (H. C. L. R. vol. 39).

to exempt him from the provisions of this act or the 9 & 10 Vict. c. 95." [JERVIS, C. J.—That has nothing to do with this sort of privilege.]

This is not the proper mode of asserting the privilege if it is applicable to process of this sort. In Bac. Abr. tit. *Privilege* (C.) 5, it is said: "It seems that formerly the usual, and indeed necessary, way of taking advantage of privilege, was, to plead the same, or to bring a writ of privilege; and that applications in other manner, or even by motion *84] in court, were held insufficient." *In the margin, it is said,— "But so early as the 44th H. 8, Ferrers, a member in execution, was delivered by the serjeant without any other warrant than his mace, even though the Lord Chancellor ordered a writ of privilege. Holling. Chron.; 1 Hats. Prec. 53; Dyer, 61 a; but quære of this case." And the learned author goes on,— "As, where the defendant, being a burgess of parliament, brought a letter from the Speaker to the King's Bench, to stay, &c., it was disallowed by the court; for, as the book says, it ought to have been a writ of privilege." Colonel Pitt's Case, —Dutton v. Pitt, Barnes, 199,—seems to dispose of the question. There, the defendant being brought up by habeas corpus from the King's Bench prison, in order to be charged in execution at the plaintiff's suit, moved by Darnal to be remanded, upon an affidavit that he was a member of the last parliament, and continued so to the end of the session; it appearing by the return of the habeas corpus, that the defendant was taken by process out of the Court of King's Bench since the end of the last session of parliament, and was not charged with any process here, the court did not think it proper that he should be charged in execution upon the judgment, but remanded him in order that he might move the Court of King's Bench to be discharged from the actions there; because, if the first taking and detainer were illegal, he ought not to be charged in execution here.(a) The circumstance of the detention being under process of an inferior court underwent discussion in Carus Wilson's Case, 7 Q. B. 984. Lord Denman there says,—p. 1008,— "The return states that the viscount and the gaoler bring up the prisoner, being in custody by virtue of the sentence of the Royal Court at Jersey, which has passed *85] upon the prisoner for the contempt, in conformity with the law of Jersey, as set out in the return. It is proposed to show, by affidavit, that the law is untruly set forth. Without inquiring whether any affidavit is receivable at all in the case of any prisoner under sentence, we may decide the question before us by considering the principle of the exception which runs through the whole law of habeas corpus, whether under common law or statute, viz. that our form of writ does not apply where a party is in execution under the judgment of a competent court. If indeed, it were proposed to show that the

(a) See *Holiday v. Colonel Pitt*, 2 Stra. 935, Comyns, 444, Cas. temp. Hard. 23, 37, Fort. 342.

prisoner had never been before such court at all, or that no such sentence had been in fact given, there might be a difficulty in saying that a traverse to that effect could not be allowed. But, when it appears that the party has been before a court of competent jurisdiction, which court has committed him for a contempt or any other cause, I think it is no longer open to this court to enter at all into the subject-matter. If we were to do so, we should constitute ourselves a court of error from such other court, and should be constantly examining whether the circumstances the existence of which was proved, warranted the opinion which such court had formed. Suppose a party were convicted of murder, and ordered to be executed in three weeks, could we, while he was awaiting the execution of his sentence, receive a statement that he was improperly convicted, that evidence was improperly admitted, or that the offence was not murder? The security which the public has against the impunity of offenders, is, that the court which tries must be considered competent to convict. We could not interfere in this way, without incurring the danger of setting at large persons committed for the worst offences. Whether the proceeding here be under statute 31 C. 2, c. 2, or 56 G. 3, c. 100, or common law, this is clearly a case in which we are *not entitled to enter into the proposed inquiry. [*86 A court within the Queen's dominions, exercising public authority, must be taken to be competent to judge of its own law. Whether the party might have an action for a false return, furnishes no test for us, since we must give credit to all countries for providing a remedy where there is a wrong. At all events, our judgment is not to be exercised by setting aside the proceedings of a competent court. A question was raised, not long ago, whether a committal by the Master of the Rolls was valid; and we held that we could not look at affidavits to show that he had acted improperly,—In the Matter of Clarke, 2 Q. B. 619 (E. C. L. R. vol. 42).” Several instances given in Com. Dig. *Privilege* (A 3), show that the proper course of proceeding in such a case, is, by writ of privilege, or supersedeas. Colonel Pitt's Case, as reported in 2 Stra. 985, shows that the court from which the process issues will discharge the party, without putting him to his writ of privilege, where the case is clear. [WILLIAMS, J.—There is no doubt about that.] Unless the case is clear, the court will *not* interfere: *Chester v. Upsdale*, 1 Wils. 278. [JERVIS, C. J.—There are great difficulties in the way of proceeding by writ of privilege.] The statute for the regulation of the petty-bag office,—12 & 13 Vict. c. 109,—gives every facility for issuing writs and trying issues thereon: and there can be no objection to their issuing to the county court. [WILLIAMS, J., referred to *Abdy's Case*, Cro. Car. 585, Sir W. Jones, 462, where an alderman of London was discharged, on the ground of privilege, from a fine imposed by a court leet.] In that case, the party being a magistrate, the court assumed to have jurisdiction. In *Luntley v. Bat-*

tine, 2 B. & Ald. 234, the party was left to his writ of privilege: and *87] Abbott, C. J., said,—“If the privilege exists,(a) it is *for the benefit of the crown, and not of the individual; and, although the court certainly have, in some instances, discharged defendants claiming privilege, on motion, it will be found on examination that those were cases where there was no doubt as to the existence of the privilege claimed. And in *Bartlett v. Hebbes*, 5 T. R. 686, where the question was, whether the defendant should be discharged on motion, or put to sue out his writ of privilege, Lord Kenyon says, ‘With respect to the mode of application, it was finally settled in *Pitt’s Case*, that a person entitled to privilege might be discharged on motion; and, although that is discretionary in the court under the circumstances, as, where there is any doubt whether the party applying be really such a person as is entitled to the privilege, or other unfavourable and suspicious circumstances, yet here, it being admitted that the defendant is a servant of the King, there is no ground for refusing to discharge him on motion.’ It appears, therefore, from this authority, that, if there be a doubt on the case, the court will not discharge him on motion, but leave him to sue out his writ of privilege: and, in *Pitt’s Case*, one reason given for it is, that the writ, if sued out, may contain suggestions which might be traversed by the other side, and so the matter be determined on record.” These authorities plainly show that applications of this sort are not to be favoured.

Then, is this a matter of doubt? Is it not, on the contrary, perfectly clear that the order of commitment under the 99th section of the 9 & 10 Vict. c. 95, is process of contempt, and not merely process of execution. The imprisonment is no satisfaction of the debt,—s. 103: and, even payment does not entitle the party to his discharge; that is, by s. 110, left to the discretion of the judge. The expression which fell from Alderson, B., in *Ex parte Foulkes*, 15 M. & W. 616,† as to its *88] being a limited *ca. sa.*, found no favour either *in the Court of Queen’s Bench or in this court. Patteson, J., expressly repudiates it in *Kinning’s Case*, 10 Q. B. 789 (E. C. L. R. vol. 59); as does - Maule, J., in the same case in this court, 4 C. B. 521 (E. C. L. R. vol. 56). In *Kimpton v. The London and North-Western Railway Company*, 9 Exch. 766,†—where a witness on a trial at *nisi prius* was arrested *redeundo*, under a warrant of commitment for not appearing to a summons issued on a judgment recovered against him in a county court; and it was held that an application for his discharge was properly made to the court in *banc*,—Martin, B., says, “The imprisonment (under s. 99) does not operate as a satisfaction of the debt: s. 103.” And Parke, B., says: “It is a proceeding, not by way of execution, but as a punishment for contempt.” The distinction between contempts of a civil and a criminal character is well put by Lord

(a) The defendant there was a “gentleman of the King’s privy chamber.”

Brougham, in *Long Wellesley's Case*,—*Wellesley v. The Duke of Beaufort*, 2 Russ. & M. 689, 667,—“With respect to the distinction between civil and criminal contempts, denied by Mr. Beames, I agree that there may oftentimes be difficulty in finding, first, authority for deciding where the line is to be drawn, and, secondly, instances in practice for drawing it. Yet that line has been recognised by the Court of Queen's Bench, in *Catmur v. Knatchbull*, 7 T. R. 448, and in *Walker v. Lord Grosvenor*, 7 T. R. 171. The former was the case of non-performance of an award, made a rule of court; for, non-performance, being a disobedience, was a contempt of the court, and so might be regarded as technically speaking and in form an offence. But the court held, that, as it related simply to a civil matter, and was rather in the nature of process to compel the performance of a specific act, the matter was in substance not criminal but civil; and it refused to commit the defendant, a member of parliament, for his disobedience. The same doctrine was laid down in the other *case, where the non-compliance was [*89 by a peer. But, suppose the matter to have been criminal, though without breach of the peace: suppose, for instance, an interruption or obstruction of the court's business by a man, having privilege of parliament, getting up and stopping the court by a long harangue, by ribaldry, by invective, by slander, or by any other indecency which human wit may fancy, or human folly may practise,—is it possible to doubt that the court would order its officer to seize him forthwith and remove and commit him to confinement, as a person who, in the face of the court, had been guilty of a contempt, of a criminal, and not of a civil kind?” It therefore appears to be the almost universal impression of the judges that the process under which this gentleman was arrested is process of contempt, and contempt of a not merely civil nature. [WILLIAMS, J.—It is quite clear that *all* the matters mentioned in s. 99, which would justify the judge of the county court in committing the defendant, are not contempts.] In *Kinning's Case*, the commitment was for the non-payment of an instalment as ordered; and two of the judges of the Court of Queen's Bench thought a previous summons was necessary, which it clearly would not have been if the commitment had been in the nature of execution. But, when the case came before this court, all the judges were of opinion that it fell within the category of punishment. Wilde, C. J., says: “The statute in question is, to a considerable extent, penal. It gives a power of awarding imprisonment that is not to operate as satisfaction or extinguishment of the debt. In the ordinary case of a defendant taken in execution on a *ca. sa.*, the imprisonment is a satisfaction of the debt or damages. Here, however, the power to incarcerate the debtor is simply used by way of coercion; and the party is to be subjected to an imprisonment not exceeding forty days, but varying, within that limit,

*90] according to the *circumstance of each particular case. The object of the act, is, to give the creditor an additional remedy against the person of his debtor, with the view to the punishment of fraud. It deals only with the person, leaving the creditor to his remedies against the property of the debtor. The general purview of the act is opposed to the inhumanity of sending a man to prison for not paying, where he has no means of payment, but it reserves a power of punishment for fraud and misconduct." And Maule, J., still more pointedly, says: "The power to commit, it appears, is to be exercised only in cases of fraud or delinquency,—where the party has been guilty of a criminal omission to do something which he is morally bound to do, and which he is able to do. Where the party does not appear, he may be taken to be within one of these descriptions. The non-payment of a debt may be a misfortune, or an act of delinquency; but it is an act of delinquency only in the event of the debtor being of ability to pay. The party, under this act, is not committed,—as under a *capias ad satisfaciendum*, which is only a mode of obtaining payment,—because he does not pay, but because he has been guilty of conduct meriting punishment." Lord Campbell's judgment in *Davies v. Fletcher*, 2 Ellis & B. 271 (E. C. L. R. vol. 75), is strong to the same effect. *Abley v. Dale*, 11 C. B. 378 (E. C. L. R. vol. 73),—where it was held, that one who has obtained his discharge under the insolvent debtors act, is still liable, at the discretion of the judge of a county court, to be committed, under the 99th section of the 9 & 10 Vict. c. 95, for disobedience of an order made upon a judgment summons under section 98, obtained after such discharge,—also shows, that, although relieved by the order of the insolvent debtors court from execution against his goods, the discharge does not enure to clear him of his contempt. It is difficult to distinguish that case, in principle, from the present.

*91] *Upon the whole, it is submitted, that, the county court not having exceeded or refused to exercise its jurisdiction, and this being process of contempt and not of execution, the applicant is not entitled to the relief he prays, or, at all events, not in this form.

Byles, Serjt., in reply.—In *Eggington's Case*, 2 Ellis & B. 717 (E. C. L. R. vol. 75), E., having been dismissed from the office of town-clerk of the borough of Lichfield, was, at the instance of the town council, convicted before two justices, under the statute 5 & 6 W. 4, c. 76, s. 60, of wilfully refusing to deliver accounts, books, &c., after notice; and thereupon the justices issued their warrant for the imprisonment of E. in the common gaol of the county of Stafford (within which Lichfield was situate); which warrant was delivered to P., who arrested E. on a *Sunday*, and on the next day delivered him to the keeper of the gaol at Stafford: and it was held that this was substantially a civil proceeding, and the arrest therefore illegal under the statute 29 Car. 2, c. 7, s. 6; and that the detention was not made legal by the delivery

to the keeper, after the arrest, of another warrant upon the same conviction: and, these two warrants having been returned to a habeas corpus ad subjiciendum, the court received an affidavit that the arrest took place on a *Sunday*, and ordered the prisoner to be discharged from custody under both warrants. And Lord Campbell said: "The return is good on its face: but the prisoner has a full right to bring before us by affidavit the fact that he was arrested on a Sunday. If that were not so, all privilege would be totally unavailing; and a party arrested upon a good warrant under circumstances which made the arrest illegal, would have no means of obtaining his liberty." It is clear, therefore, that affidavits are admissible upon an application of this sort. The object of the commitment **is*, the obtaining payment of the debt. Upon that being paid, the party is at once entitled to his discharge; [*92 the "leave of the judge" in that case is not discretionary. If the party here is entitled to his discharge, it would be a scandal and a reproach to the law, if he should be put to the difficult and tedious, perhaps impracticable, course of proceeding by writ of privilege.

JERVIS, C. J.—Although I have entertained considerable doubt, as well during the argument of this motion, as when the matter was before me at Chambers, upon the whole I am now of opinion that the defendant is entitled to his discharge. There is no question, that, if this were an application to the court out of which a ca. sa. had issued against this gentleman, he must have been at once discharged: this was done in the case of this very defendant, in *Harvey v. Dakins*, 3 Exch. 266.†(a) But Mr. *Milward* contends, that, though that would be so in the case of a commitment under civil process, yet the privilege does not extend to process issuing out of the county court, because that is a commitment in the nature of punishment. There is no question, that, if this *were* a commitment for contempt, or clearly for punishment only, the privilege would not apply. That, indeed, was conceded by my Brother *Byles*. But I think this is not properly a commitment of that description, but rather in the nature of a limited or qualified execution,—its object being to get the money by coercing the person of the debtor. The principal grounds upon which it has been contended that the commitment in question is for punishment only, are, that the imprisonment under it does not operate as a satisfaction of the debt, and that the party committed is not entitled to his discharge, upon the mere payment of **the debt*. But the 110th section of the 9 & 10 Vict. c. [*93 95, enacts, that, where the person imprisoned under the act shall have satisfied the debt and costs, he *shall be discharged* out of custody, "upon the certificate of such payment or satisfaction, signed by the clerk of the court, by leave of the judge of the court." The fair meaning of that section is, that, when the money is paid, the judge becomes a mere ministerial officer to order the discharge. He has no

(a) And see *Winter v. Dibdin*, 13 M. & W. 25.†

discretion. The prisoner is entitled to the order as a matter of course.^(a) It seems to me, therefore, that there is nothing in the nature of the custody here to deprive the defendant of his privilege, but that the case is the same as if it were an application for redress for an apprehension under process issuing of execution out of one of the superior courts. Then it is said, that, assuming the defendant to be entitled to be discharged, the application for that purpose should have been made to the court out of which the process issued; for, that, there being nothing irregular or informal in the warrant, this court has no right to interfere. But I think there is a difficulty in that argument. According to the old practice, the course was, not to discharge the prisoner on motion, but to issue a writ of privilege: and Mr. *Milward* has failed to satisfy me that such a writ could issue out of the petty-bag office to the county court. The party, therefore, must have some other remedy. He is illegally detained in custody. The ordinary remedy in such a case is, to apply for a habeas corpus, assisted, as here, by affidavits showing that the detention is illegal,—as was held by the Court of Queen's Bench in *94] *Ex parte *Eggington*. We have also the authority of my Brother *Patteson*, who discharged a servant of Her Majesty upon precisely the same ground upon which this gentleman's discharge is sought. I think that will amply justify us in adopting the same course, and ordering Dr. *Dakins* to be discharged from custody.

CRESSWELL, J.—I am of the same opinion. It is conceded that Dr. *Dakins* is by reason of his office privileged from arrest in execution for *debt*; and that, if this were the case of a mere commitment for non-payment of a debt, he would be entitled to his discharge. Now, I think this is to be considered as an imprisonment in execution for a debt, though the debt is not discharged by the imprisonment. The reasons why the incarceration of the debtor was considered to be a satisfaction of the debt in the superior courts, are not applicable to these commitments. It is true, that, in every one of the instances mentioned in the 99th section of the 9 & 10 Vict. c. 95, there is something like misconduct: but the 110th section shows that the object of the imprisonment is, the enforcing payment of the debt; it enacts "that any person imprisoned under this act who shall have paid the debt or demand, or the instalments thereof payable, and costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining such order, and all subsequent costs, shall be discharged out of custody;" and then it specifies how, viz. "upon the certificate of such payment or satisfaction, signed by the clerk of the court, by leave of the judge of the court in which the order of imprisonment was made." The debt being paid, the judge is as much bound to grant leave for the

(a) But see *Davies v. Fletcher*, 2 Ellis & B. 271, 277 (E. C. L. R. vol. 75), where Lord Campbell says: "Payment did not purge the contempt in not appearing. Such a commitment as the present is very different from an execution or an attachment for not paying money."

party's discharge, as the clerk is bound to sign the certificate of payment. That shows that the commitment really is a commitment for non-payment of the debt, and not merely as a *punishment for contempt; [*95 and, consequently, the character of the imprisonment here does not take away the applicant's privilege. Then it is said that the party should have applied in the first instance to the judge of the county court. Upon that matter, however, I am quite satisfied to rely upon the decision of my Brother Patteson, to which we have been referred. The rule must be made absolute.

WILLIAMS, J.—I am of the same opinion. After full consideration, I am satisfied that the applicant is improperly in custody, because, it being admitted that he is privileged from arrest under civil process, I think he is now being detained under civil process. It is true that the 99th section of the 9 & 10 Vict. c. 95, does not authorize the county court judge to commit to prison except in cases of misconduct: but, when imprisonment is ordered, it is in effect for the non-payment of the debt. That is obvious, from the 110th section. I was at first inclined to think that that section did not make it imperative on the judge of the county court to order the discharge of the party, on payment of the debt and costs. But, upon reflection, I think it clearly is imperative on the judge to give leave for the prisoner's discharge, where he has paid the debt and costs, and the clerk's certificate to that effect is laid before him. That satisfies my mind that the commitment is equivalent to an imprisonment under an attachment for non-payment of a debt,—or in other words, that it is substantially civil process. The question upon which I have felt the greatest difficulty, is, whether a habeas corpus was the appropriate remedy. But I am satisfied on that score with the decision of Mr. Justice Patteson, who well considered the matter. I was at first inclined to think with Mr. *Milward*, that the proper course would be, to apply to the court out of which the process issued: but the *authority of that case is sufficient to [*96 show that this court has power to order a habeas corpus to issue in all cases where the party applying can show that he is improperly in custody and is entitled to be discharged.

CROWDER, J.—I am of the same opinion. This application involves two questions,—first, whether Dr. Dakins is entitled to the privilege he claims,—secondly, whether he has adopted the right mode of asserting it. The first question depends upon the 99th and 110th sections of the 9 & 10 Vict. c. 95. Looking at both these sections together, it seems to me that the commitment under the former amounts to a commitment on civil process; for, although it is only in cases of misconduct on the part of the debtor that the judge of the county court has power to commit, the 110th section admits of a different construction, inasmuch as the payment of the debt and costs entitles the party to his discharge at once. The judge has no discretion. If that were not so,

a party might be committed for forty days, and, though he paid the debt the next day, the judge might keep him in custody for thirty-nine days more. That is a thing that would not be very likely to occur: but at the same time, I think it is a power which the legislature did not mean to give to the judge. As to the second question, it seems to me that Mr. Justice Patteson's decision ought to guide us; more especially as Mr. *Milward* has failed to show us that the writ of privilege could issue to a county court. The absence of authority for that, shows, I think, that a habeas corpus is the proper remedy.

Rule absolute to discharge the defendant.

***97] In the Matter of FRANCIS ROBERT NEWTON. May 5.**

This court has no power to grant a habeas corpus to bring up a prisoner who has been convicted at the Central Criminal Court, on the ground that the offence charged was committed at a place out of the jurisdiction of that court.

The proper course is, to apply to the Attorney-General for his fiat for the allowance of a writ of error coram nobis, the granting or withholding of which is matter for his discretion.

The court declined to allow the motion for the habeas to be made by the *father* of the prisoner, but required it to be made by counsel.

At the session held at the Central Criminal Court in December last, Francis Robert Newton and William Philip Newton were tried upon an indictment, charging them, in the first count, with an attempt to murder one Adam Stewart Kerr, by striking him with a whip and a stick; in the second count, with a felonious assault; and in the third count, with a misdemeanor in unlawfully wounding the prosecutor. To this indictment, the prisoners pleaded not guilty. They were acquitted of the felony, but found guilty of the misdemeanor, under the 14 & 15 Vict. c. 19, s. 5.(a) They were thereupon sentenced to be imprisoned in the county gaol, Horsemonger Lane, the former for a period of nine the latter for three calendar months.

The indictment alleged that the offence was committed in "the grounds of the Beulah Spa at Norwood, in the parish of Lambeth, and within the jurisdiction of the Central Criminal Court."

***98]** Having afterwards ascertained that the grounds of the *Beulah Spa were not in the parish of Lambeth, but in the parish of Croydon, and consequently not within the jurisdiction of the Central Criminal Court,—being upwards of seven hundred and seventy yards from

(a) Which enacts, that, "if upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding."

the nearest boundary of the parish of Lambeth, or any other parish or place within the jurisdiction of that court,^(a)—the prisoners caused application to be made to Lord Campbell and Crowder, J., at the next session, to direct the officer of the court so to draw up the record of their conviction as to leave it open to them to raise the question of jurisdiction upon a writ of error. The application, however, was refused, as being too late.

The prisoners then applied to the Attorney-General for his fiat for the allowance of a writ of error, the application being supported by affidavits and by counsel's certificate. After hearing both sides by counsel, the Attorney-General declined to grant his fiat, on the ground that no want of jurisdiction appeared upon the record, and that, if the same were alleged as error in fact, it would contradict the record.

An application was then made to Cresswell, J., at *Chambers, [*99 for the discharge of the prisoners on a habeas corpus; which was negatived on the same ground.

The prisoner Francis Robert Newton afterwards (the term of imprisonment of the other prisoner having expired) upon the authority of *Rex v. Wilkes*, 4 Burr. 2527, moved for a mandamus in the Court of Queen's Bench to compel the Attorney-General to grant a fiat; and that likewise was refused.

Augustus Henry Newton, the father of the prisoner, on a former day in this term, moved, on behalf of his son, for a writ of habeas corpus to bring him up to be discharged from custody on the grounds above alleged. [JERVIS, C. J.—Can we hear you on behalf of a third person?] The statute 31 Car. 2, c. 2, s. 8, authorizes the application to be made by the party detained, "or any one on his or their behalf." Mrs. Cobbett has on several occasions been permitted to move in this and other courts on behalf of her husband.^(b) [JERVIS, C. J.—That is rather a different case. We will consider the point, and the matter may be mentioned again to-morrow.]

JERVIS, C. J., at the sitting of the court on the following morning, intimated to Mr. Newton, that the judges had come to the conclusion,—without laying down any inflexible rule upon the subject,—that it would be better under all circumstances that the motion should be made by counsel.

J. H. Hodgson now moved accordingly.—The Attorney-General was

(a) The jurisdiction of the Central Criminal Court, under the 4 & 5 W. 4, c. 36, s. 2, so far as regards the county of Surrey, is confined to the following parishes and places:—"the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the same county of Surrey, Tooting, Graveney, Wandsworth, Merton, Merlake, Kew, Richmond, Wimbledon, the Clink Liberty, and the district of Lambeth Palace."

Where a felony or misdemeanor is committed on the boundary of two or more counties, or within the distance of five hundred yards of the boundary, the same may be laid in either county: 7 G. 4, c. 64, s. 12. But this enactment, it seems, extends to the boundaries of counties only, and not to prosecutions in limited jurisdictions: see *Rex v. Welch*, 1 Mood. C. C. 175.

(b) See *Ex parte Cobbett*, 5 C. B. 418 (E. C. L. R. vol. 57).

probably right in declining to grant his fiat, upon the authority of *The King v. Carlile*, 2 B. & Ad. 362, 971 (E. C. L. R. 22). The proper *100] course of proceeding, *therefore, would seem to be by habeas,—not under the 31 Car. 2, c. 2, but at common law.^(a) [JERVIS, C. J.—You move upon an affidavit showing that the jury came to a wrong conclusion upon a question of fact, viz. the place where the offence was committed. They might have come to a wrong conclusion as to the prisoner's guilt of the offence imputed to him. Is that a ground for a habeas corpus? Is not their verdict on it an estoppel?] The jury have assumed a jurisdiction which the law has not given them. [JERVIS, C. J.—Have you any authority for such an application,—any case where the party has admitted the jurisdiction?] There is no case precisely in point. But it is submitted that there is authority for saying that affidavits may be used upon applications of this nature, to show facts which are not set forth upon the record. Thus, in *Ex parte Lampon*, 3 Deac. & Ch. 751, where a party was brought before Lord Brougham, C., by habeas corpus, to be discharged from imprisonment under an illegal warrant of commissioners of bankrupt, his lordship said,—“Certainly affidavits may be read for the purpose of showing circumstances not set forth in the warrant; otherwise, the grossest injustice might be occasioned either from carelessness or design; for, there would be nothing to prevent commissioners from making up a warrant either false or faulty; and, as the London commissioners are constituted judges of record, no action would lie against them for the consequences of such an act.” [JERVIS, C. J.—Here, you seek to *contradict* the record. Might you not have traversed the allegation as to the locality?] Probably we might. In the case of *In re Bailey*, 2 Ellis & B. 607 (E. C. L. R. 75), the return to a habeas corpus ad subjiciendum, to bring up B., assigned as the cause of B.'s detention a warrant *101] by a justice, which *recited, in the past tense, that “B. was” this day “convicted before me” of an offence against the statute 4 G. 4, c. 34, “and I, the same justice, adjudged” that B. should be committed for two months, with hard labour; and the warrant then, in the present tense, commanded the constables to take and the gaoler to receive B. The warrant did not set forth the evidence, nor state that it was taken in the prisoner's presence, or on oath. And the court held that it was open to the prisoner to show by affidavit, that there was no evidence from which the justice might reasonably draw an inference that the relation of master and servant existed between the prisoner and his employer, as that would show that the justice had no jurisdiction.

JERVIS, C. J.—The question raised in this case is undoubtedly one of very great importance. No authority has been found to warrant it.

(a) See the judgment of Patteson, J., in *Carus Wilson's Case*, 7 Q. B. 1008 (E. C. L. R. vol. 53).

The point, it would seem, therefore, has never before been raised,—it may be because it is so plain that there is nothing in it. The state of things is this:—Mr. Newton has been tried and convicted on an indictment alleging that the offence charged was committed within the jurisdiction of the Central Criminal Court. Either that was traversed, or the jurisdiction was admitted by pleading over. If it were traversed, the finding of the jury is, that the prisoner committed the offence within the jurisdiction of the court, as alleged. He now seeks to impeach that finding, on the ground that the place where the offence was actually committed is more than one thousand yards distant from the boundary of the parish in which the record alleges it to have been committed. That is not to be governed by the inquiry whether the fact be indisputable or otherwise. If we could entertain the application because the boundary is clearly ascertained, we should be equally bound to entertain disputes of the most refined and minute character. The inconvenience of this is manifest. The truth is, that the remedy [*102] is not by an application of this sort. The proper course is, to apply to the Attorney-General for his fiat for a writ of error coram nobis, on the ground that there is error in fact,—dehors the record. The Attorney-General has a discretion to grant or to refuse it. It is not to be granted capriciously, or as a matter of course.(a) He is bound to refuse it if he thinks justice requires that he should do so. When I was Attorney-General, I had occasion to look into this matter with the deepest anxiety. I was applied to to grant a fiat for the allowance of a writ of error in the case of the Mannings, who had been convicted of murder: and, after much and most painful reflection and inquiry, I felt it to be my duty to refuse it: and I accordingly did so. I have always thought, and still think, that the granting or withholding the fiat is matter entirely for the discretion of the Attorney-General, subject to the wholesome control of public opinion and of the proper authorities. Failing that remedy, the party cannot question the truth of the record upon a habeas corpus. This does not leave the party wholly without redress: he may obtain it from the prerogative of the crown. He may make application to the Secretary of State. Possibly that course has already been resorted to without success.(b) I am clearly of opinion that this application is as groundless as it is unprecedented.

CRESSWELL, J.—I am of the same opinion. A record *is of so high a nature, that, according to the case of *The King v. Car-* [*103
lile, 2 B. & Ad. 362, 971 (E. C. L. R. vol. 22), if you assign for error in fact that which contradicts the record, it is ill. So that we are asked to do upon a motion for a habeas corpus that which we could not

(a) "Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular." Per Lord Mansfield, in *Rex v. Wilkes*, 2 Burr. 2539.

(b) *Hodgson* intimated that this was the fact.

do on a writ of error. What authority has this court to discharge the prisoner? That can rest only with the Secretary of State.

WILLIAMS, J.—I am quite of the same opinion. The averment that the offence was committed within the jurisdiction of the Central Criminal Court was just as material as any other averment contained in the indictment. If the prosecutor had failed to prove it, he would have failed to sustain the indictment, and the prisoner would have been entitled to an acquittal. If an application of this sort could be entertained, it would be open to a party, after a lengthened inquiry at the assizes as to whether or not the alleged offence was committed within the county, to cause himself to be brought up by habeas corpus, and have the whole matter tried over again upon affidavits. So monstrous a state of things never could be.

CROWDER, J.—I am of the same opinion. In the absence of any authority for this motion, we are bound to disallow it. Ordinarily, upon criminal trials, the jurisdiction of the court over the place where the offence is alleged to have been committed is assumed. And here, no doubt, the trial proceeded upon the assumption that Beulah Spa was within the jurisdiction of the Central Criminal Court. Whether it was so or not was as much a matter of fact to be proved (or admitted) as any other fact alleged in the indictment, in order to establish the conviction. We are now called upon to moot that question upon affidavit. We cannot do that. The record conclusively establishes the fact.

Refused.

*104]

*COLEMAN v. RICHES. May 2.

A master is civilly responsible for the fraud or negligence of his servant acting in the course of his employment; but not for an act of wilful fraud or negligence done by him out of the scope of his authority, or inconsistent with the course of his employment.

Therefore, where A., the servant of a wharfinger, fraudulently signed a receipt purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, to be shipped to the order of C., no such wheat having in fact been delivered, and thereby wilfully induced C. to pay the price thereof to the pretended vendor:—Held, that the wharfinger was not liable,—although it was proved that C.'s course of dealing was, to pay for all wheat delivered for him at the wharf, on the production by the vendor of the wharfinger's receipt, and that the latter knew it.

But, *semble*, that it would have been otherwise, if there had been any evidence of an understanding or agreement between C. and the wharfinger to the effect above stated.

THE declaration stated that the defendant falsely and fraudulently affirmed to the plaintiff that the defendant had received at Bristol for the plaintiff, from one W. S. Lewis, to be taken care of and carried for the plaintiff by the defendant from Bristol to Cardiff, for reward in that behalf to him from the plaintiff, fifty-eight sacks of wheat containing five bushels each, and one sack of wheat containing four bushels, which the plaintiff before the said affirmation, as the defendant before and at

the time of the said affirmation well knew, had bought from the said W. S. Lewis for the sum of 124*l.* 15*s.*, payable on the receipt by the defendant at Bristol of the said sacks of wheat from the said W. S. Lewis for the plaintiff, to be so taken care of and carried as aforesaid; whereby the plaintiff was induced to pay, and did pay, to the said W. S. Lewis the said agreed sum of 124*l.* 15*s.*: whereas, in truth and in fact, as the defendant at the time of the said affirmation well knew, the said sacks of wheat, or any of them, had not at the time of such affirmation, nor had they or any of them since, been so received by the defendant for the plaintiff; and the said sum of 124*l.* 15*s.* so paid as aforesaid had been wholly lost to the plaintiff.

There was also a count charging the defendant with having converted to his own use, or deprived the plaintiff of the use and possession of, the plaintiff's goods, that is to say, fifty-nine sacks of wheat.

*The defendant pleaded not guilty.

The cause was tried before Martin, B., at the last Assizes at ^[*105] Gloucester. The facts that appeared in evidence were as follows:—The plaintiff was a corn-dealer and miller residing at Llandaff, and was in the habit of attending the market at Bristol every week for the purpose of buying corn. The defendant was a wharfinger and carrier, having vessels which traded between Bristol and Cardiff. The plaintiff had been in the habit of shipping corn by the defendant's vessel; the course of dealing being as follows:—When the plaintiff purchased corn, he directed the seller to deliver it at the defendant's wharf, to be there shipped for Cardiff; and, upon the production by the seller of a receipt signed by the defendant or his agent vouching for the delivery of the corn at the wharf, the plaintiff paid him the amount.

On the 7th of December, 1854, the plaintiff's son attended the Bristol market, and purchased of one Lewis a parcel of wheat, which he directed Lewis to deliver "to George Coleman, Riches's Wharf, 11 Welsh Bank, Bristol;" and, upon meeting Lewis, accompanied by Board, the defendant's agent, at the wharf, and Lewis producing a receipt in the usual form, signed by Board, and representing in Board's presence that the wheat had been delivered at the wharf, the plaintiff paid Lewis the price, 124*l.* 15*s.* It turned out that the transaction was a fraud on the part of Lewis and Board, the wheat never having been delivered at all at the wharf; and, upon inquiry, Lewis was not to be found, and Board absconded.

For the defendant, it was submitted that he was not responsible for this fraud on the part of his agent.

The learned baron was of opinion that the action would not lie, and directed a nonsuit, reserving leave to the defendant to move to set aside the nonsuit, and enter a verdict for 124*l.* 15*s.*, if the court should think the action maintainable.

*106] *Keating*, on a former day in this term, obtained a rule nisi accordingly.

Whateley and *Phipson* now showed cause.—There was no evidence for the jury to fix the defendant with liability for the fraud of his agent Board. The important question is, what was Board's duty with reference to his employ by the defendant? That Lewis and Board had conspired to defraud the plaintiff, there can be no doubt. [JERVIS, C. J.—The false representation was made by Lewis, Board being present. Two questions will arise,—one, whether Board had authority from his employer to act as he did,—the other, whether he was acting within the scope of his authority in going with Lewis to countenance Lewis's misrepresentation. CRESSWELL, J.—Where is the evidence that Riches was cognisant of or party to the course of dealing suggested?] There is none. The main question is, whether Board was acting within the scope of his authority in giving a receipt or acknowledgment for wheat which had never in fact been delivered. This was a criminal act, for which both Board and Lewis might be indicted. How can Riches be liable for the criminal, the felonious act of his servant? [JERVIS, C. J.—I certainly do not see how Riches' *knowledge* that Coleman was in the habit of paying the vendors on the production of his receipt acknowledging the delivery of the wheat, makes his giving such receipt a representation to Coleman.] A principal never has been held liable for the act of his agent, unless for something done within the scope of his authority and in the course of his employment as agent. The better expression is "the course of his employment;" and that is a mixed question of law and fact. To make the principal liable, the agent or servant must be employed by him to do the act in the course of the performance of which he is guilty of the negligence or the fraud

*107] *complained of. [JERVIS, C. J.—The authority of this man was of a limited character. He was only authorized to give receipts when the wheat was actually delivered.] In Bacon's Abridgment, *Master and Servant* (K,) it is said: "The reason why the acts of a servant are, in many instances, esteemed the acts of the master, arises from the relation between a master and servant; for as in strictness everybody ought to transact his own affairs, and it is by the favour and indulgence of the law that he can delegate the power of acting for him to another, it is highly reasonable that he should answer for such substitute, at least civiliter; and that his acts, *being pursuant to the authority given him*, should be deemed acts of the master. Therefore, if a goldsmith makes a plate, wherein he mingles dross, so that it is not according to the standard, and by his servant sells it, an action lies against the master, because it fails in the price in silver. But, if A., being possessed of certain artificial and counterfeit jewels, of the value of 168*l.*, and, knowing them to be such, delivers them to B., his servant, commanding him to transport the said jewels to Barbary, and to

sell them to the King of Barbary, or such other person as would buy them, *but gives B. no charge to conceal their being counterfeit*; and thereupon B. goes into Barbary, and, knowing those jewels to be counterfeit, shows them to C. for good and true jewels, and, affirming to C. that they were worth 810*l.*, desires C. to sell them to the said King for 810*l.*, which money C. pays B., and B. thereupon immediately returns to England, and pays the 810*l.* to A., his master; and after, the jewels being discovered to be counterfeit, C. is imprisoned by the said King till he repays the 810*l.* out of his own effects,—of all which matters C. gives notice to A., and demands satisfaction, &c.: yet no action lies against A., for, jewels are in themselves of an uncertain value, and B. was not by A. particularly directed to C., and all **that was done* [**108* quoad C. was the voluntary act of the servant, for which the master is not bound to answer:” *Southern v. How*, Cro. Jac. 468, *Bridgman*, 125, Poph. 148, 2 Roll. Rep. 5, 26, 2 Moll. 380. [*JERVIS*, C. J.—*Mr. Smith*, in his *Mercantile Law*, 5th edit. p. 158, says the master was held liable in the case put in *Bacon’s Abridgment*: and he adds,—“The reason given for this by Lord C. J. Holt appears a sensible one: ‘Seeing,’ says he, ‘that some one must be a loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser, than a stranger.(a) Such certainly was the opinion of the Roman lawyers, ‘Procuracionis scientiam et dolum noscere debere dominus, neque Pomponius dubitat, neque nos dubitamus:’ Dig. 14.4.5. Ulpian.”] There are numerous authorities in support of the distinction here contended for. Thus, in *M’Manus v. Crickett*, 1 East, 106, it was held that a master is not liable in trespass for the wilful act of his servant, as, by driving his master’s carriage against another, done without the direction or assent of the master: but he is liable to answer for any damage arising to another from the negligence or unskilfulness of his servant *acting in his employ*. So, in *Croft v. Alison*, 4 B. & Ald. 590 (E. C. L. R. vol. 6), it was held, that, where the defendant’s servant wantonly, and not in order to execute his master’s orders, strikes the plaintiff’s horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, although injudiciously, his master is liable. To the like effect are the cases of *Joel v. Morison*, 6 C. & P. 501 (E. C. L. R. vol. 25), and *Mitchell v. Crassweller*, 13 C. & B. 287 (E. C. L. R. vol. 76). [*JERVIS*, C. J.—The cases upon the subject are very numerous, though apparently a little conflicting. But I **think* *Mr. Smith* is mistaken in saying that the civil law is the same. In *Story on Agency*, § 452, it is said: “It is a general [**109* doctrine of law, that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit,(b) for the acts or misdeeds of his

(a) *Mr. Smith* is here referring to *Hern v. Nichols*, 1 Salk. 289, not to the jewel case.

(b) *Attorney-General v. Siddon*, 1 Tyrwh. 41, 1 C. & J. 220; † *Rex v. Goutch*, M. & M. 437 (E. C. L. R. vol. 22); *Paley on Agency*, by Lloyd, 294–298, 305, 306; 3 Chitty on Comm. and Manuf. 209. 210; *Smith’s Mercantile Law*, 5th edit. 158 et seq.

agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds: yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfassances or misfeasances and omissions of duty of his agent *in the course of his employment*, although the principal did not authorize, or justify, or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts, or disapproved of them.(a) In all such cases, the rule applies respondeat superior, and it is founded upon public policy and convenience; for, in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents.(b) In every *110] such case, *the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.”(c) The subject was very elaborately examined by Bayley, B., in *The Attorney-General v. Siddon*, 1 C. & J. 220,† 1 Tyrwh. 41. He puts it as a question of evidence.] In *Middleton v. Booth*, 1 Salk. 282, Lord Chief Justice Holt lays it down that “no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master.” Again, in *Kingston v. Booth*, Skinner, 228, it was resolved by the court, that, “if I command my servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act; otherwise it was in the power of every servant to subject his master to what actions or penalties he pleased.” In the instances put by Dr. Story, where the master is held responsible for the tortious act of the servant, the act has been done in the course of his employment, and for his master’s profit. In § 456, he says: “But, although the principal is thus liable for the torts and negligences of his agent; yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs *in the course of the agency*. For, the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit. Hence it is, that the principal

(a) 1 Chitty on Comm. and Manuf. 208-210; Paley on Agency, by Lloyd, 294-296, 301-307; Smith’s Mercantile Law, 2d edit. 70, 71, 3d. edit. 127-130; *Doe v. Marten*, 4 T. R. 66, per Lord Kenyon; *Bush v. Steinman*, 1 Bos. & P. 404; *Attorney-General v. Siddon*, 1 Tyrwh. 41, 1 C. & J. 220;† *Milligan v. Wedge*, 12 Ad. & E. 737, 742 (E. C. L. R. vol. 40), 4 P. & D. 714; *Quarman v. Burnett*, 6 M. & W. 499;† *Locke v. Stearns*, 1 Metc. R. (American) 560; *Pennsylvania Steam Navigation Company v. Hungerford*, 6 Gill & Johns. (American) 291.

(b) 1 Bl. Comm. 431, 432; *Abbott on Shipping*, Part 2, Ch. 2, § 11; *Ellis v. Turner*, 8 T. R. 533; *Bush v. Steinman*, 1 Bos. & P. 404; *Laugher v. Pointer*, 5 B. & C. 547 (E. C. L. R. vol. 11), *Randleson v. Murray*, 8 Ad. & E. 109 (E. C. L. R. vol. 35), 8 N. & P. 239; *Milligan v. Wedge*, 12 Ad. & E. 737 (E. C. L. R. vol. 40), 4 P. & D. 714; *Quarman v. Burnett*, 6 M. & W. 499;† *Rapson v. Cubitt*, 9 M. & W. 499;† *Winterbottom v. Wright*, 10 M. & W. 109.†

(c) See the opinion of Lord Holt in *Lane v. Cotton*, 12 Mod. 490; Paley on Agency, by Lloyd, 294, 301-307; *Bac. Abr. Master and Servant* (K); *Hern v. Nichols*, 1 Salk. 280.

is never liable for the unauthorized, the wilful, or the malicious act or trespass of his agent. Thus, if a servant, while driving the carriage of his *master, should wilfully or maliciously run against or [*111 upset another carriage, or run down and injure a person in the road, or should jump from his box and beat a person; in all these cases, he, and not his master, would be liable for this wanton wrong and mischief. So, the master of a ship is not liable for a wilful act of injury done to another ship by his crew, although he would be for such an injury done by their negligence." So, here, the defendant might have been held liable for any fraud or negligence committed by Board in respect of goods which had been delivered to him, but clearly not for falsely representing that he had received the goods, when he had not received them. *Grant v. Norway*, 10 C. B. 665 (E. C. L. R. vol. 70), ought to dispose of this case: it was there held, that the master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed. It is scarcely possible to conceive a stronger case than that. The court there, admitting that the master of a ship has a larger general authority than any other description of agent, nevertheless held that his authority does not extend to do the act the master there assumed to do, and that, from the general usage of trade, the merchant taking a bill of lading under such circumstances must be taken to have had notice of his limited authority. Suppose I go to the shop of a pawnbroker to pledge my goods, the master would be liable to me for any fraud or negligence of which his shopman might be guilty in the transaction: but, if I go to the shopman, and say, give me a ticket for goods not deposited, and we share the plunder, could it in that case be contended that the master would be liable? In *Lyons v. Martin*, 8 Ad. & E. 512 (E. C. L. R. vol. 35), 3 N. & P. 509, it was held that a master is answerable in trespass for damage occasioned by his servant's *negligence in doing a lawful act in the course of his service; [*112 but not so if the act is in itself unlawful, and is not proved to have been authorized by the master: as, if a servant, authorized merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrains them. In that case, the act done by the servant was a deliberately wrongful act altogether out of the course and scope of his employment. Lord Denman there says: "The instances where an injury has resulted from negligence in performing a lawful service, do not apply. In *The Attorney-General v. Riddle*, 2 C. & J. 498,† 2 Tyrwh. 523, where the wife of a papermaker delivered out paper without proper stamps, the Court of Exchequer held it to be a fit question for the jury whether or not the husband was chargeable with her acts, as done under his authority: but that decision proceeded on the supposition that the husband was generally presiding over the

business, and that anything done in the management of it by a person usually acting in it under his control, as the wife was shown to have been, might be referred to him." And Patteson, J., said: "*Brucker v. Fromont*, 6 T. R. 659, and other cases, where the master has been held liable for the consequences of a lawful act negligently done by his servant, do not apply. Here the act was utterly unlawful. A master is liable where his servant causes any injury by doing a lawful act negligently, but not where he wilfully does an illegal one."

Keating and John Gray, in support of the rule.—The defendant is clearly liable for the fraudulent misrepresentation of his agent. In *Alexander v. Gibson*, 2 Camp. 555, where a question arose as to whether a master was bound by a warranty given by his servant on the sale of a horse, Lord Ellenborough said: "If the servant was authorized to *113] sell the horse, and receive the stipulated *price, I think he was incidentally authorized to give a warranty of soundness. It is now most usual, on the sale of horses, to require a warranty; and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done: and the agent must be taken to be vested with power to transact the business with which he is intrusted, in the common and usual manner. I am of opinion, therefore, that, if the defendant's servant warranted this horse to be sound, the defendant is bound by the warranty." [CRESSWELL, J.—Would you hold that to be good law at the present day?] The principle upon which it is founded received the endorsement of Bayley, B., in *The Attorney-General v. Siddon*. [CRESSWELL, J.—In the case of a horse-dealer, the presumption of authority in the servant to warrant arises: and, probably a horse-dealer would be liable on a warranty by his servant, even though he expressly desired his servant not to warrant the horse.] In the present case, Board was the general agent of the defendant for transacting the business of the wharf, and it was proved to be the course of business there to give receipts like that in question, to indicate to the plaintiff that he might pay the money. Suppose one bushel of wheat only had been delivered, and a receipt given for 1000, with intent that 1000 should be paid for, could it have been contended that that would not be an act done in the course of the employment of the party? In *Rapp v. Latham*, 2 B. & Ald. 795, A. employed B. and C., who were partners as wine and spirit merchants, to purchase wine, and to sell the same upon commission. C., the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit: the proceeds of such supposed sales he paid to A., and rendered accounts, in *114] which he *stated the purchases to have been made at a certain rate per pipe. In fact C. had neither bought nor sold any wine. The transactions were wholly fictitious, but B. was ignorant of

that. Upon the whole account a larger sum had been repaid to A. as the proceeds of that part of the wine alleged to be resold, than he had advanced, but the other part of the wine, which C. represented as having been purchased, was unaccounted for. It was held that B. was liable for the false representations of his partner; and that A. was entitled to retain the money that had been paid to him upon these fictitious transactions, as if they were real. [CROWDER, J.—What answer do you give to the case of *Grant v. Norway*?] That case quite steers clear of this. [JERVIS, C. J.—All these cases depend upon the fact of what is the scope of the authority of the party. The master of a ship has no general authority, but only certain special authorities,—amongst others, to sign bills of lading for goods which are actually shipped. Was Board acting within the scope of his authority, or in the course of his employment, or for his employer's benefit, in doing the act in question? That he had no *actual* authority, is clear: it is to be inferred, therefore, from the surrounding circumstances.] If this had been a real transaction, the signing of the receipt would have been an act done for the benefit of the defendant. [JERVIS, C. J.—If the receipt had vouched the delivery of a comparatively small quantity of wheat beyond what had actually been delivered, a different question might have been raised. *Phipson*.—*Hubbersty v. Ward*, 8 Exch. 830,† adopts the decision of this court in *Grant v. Norway*.] It is of the utmost importance that parties dealing with agents should be able to rely upon representations made by them when professing to act for their principals. In *Willet v. Chambers*, 2 Cowp. 816, it was held, that, if two are partners as attorneys and conveyancers, and one receive *money to be laid out on mortgage, the other is liable for the [*115 amount, though his partner gave a separate receipt for it. [CRESSWELL, J.—The partner who received the money had authority to receive it. JERVIS, C. J.—It was not in respect of the misappropriation, but in respect of the receipt of the money that the other partner was held liable.] In *Grammar v. Nixon*, 1 Stra. 653, a goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an assay then shown; upon the evidence it appeared he had forged the assay, and that the ingot was made out of a lodger's plate, which he had stolen: and the master was held answerable for his apprentice's fraud. [JERVIS, C. J.—That was on the ground that the sale took place in the course of business in the master's shop.] Unless the defendant be held liable in this case, a master never can be made responsible for the fraud or false representation of his servant. The question is not, whether, as between himself and his employer, the servant has authority to do what he has done, but whether the position in which he was placed was such as to induce third persons to deal with him upon the faith that he had such authority. In *Fuller v. Wilson*, 3 Q. B. 58 (E. C. L. R. vol. 43), 2 Gale &

D. 460, the defendant, being owner of a house, employed an agent to sell it: the agent described it as free from rates and taxes, and did not know it to be otherwise; but it was in fact liable to certain rates and taxes, as the defendant knew: on the faith of the agent's description, the plaintiff bought the house: it was held that the plaintiff might maintain deceit against the defendant, though it did not appear that the defendant had instructed the agent to make any representation as to rates or taxes.^(a) Taking into consideration the *evidence as to *116] the known course of dealing here, the defendant may be assumed to have said to the plaintiff,—“When you see my receipt, or that of my agent, vouching for the delivery of wheat on the wharf, you may safely pay the money.” If for his own convenience a man chooses to carry on his business by means of an agent, it is but reasonable that he should be responsible for his integrity. [CRESSWELL, J.—I do not find any evidence that Board was the defendant's agent for the purpose you assume, or that there was any such course of dealing between the plaintiff and defendant as you assume. It may be that the defendant knew the course of dealing between the plaintiff and those of whom he was in the habit of buying wheat, and that he knew that his receipt would probably be used for the purpose of obtaining payment for the wheat.] It was assumed at the trial that there was this general course of dealing, and that all parties were aware of it. [WILLIAMS, J.—If the fact were so, it is unfortunate that there should be no evidence of a bargain between the plaintiff and the defendant that the former should have the latter's assurance that the wheat had been delivered, before he paid the vendors for it.] It was not proved, because it was never for a moment disputed. [CRESSWELL, J.—Board's authority was, to receive the wheat, and to acknowledge its receipt. He was employed, not to make statements, but contracts.] In *Cornfoot v. Fowke*, 6 M. & W. 358,† Parke, B., says:—“It must be conceded, that, if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, *knowingly* commits a fraud in making it, not only is the contract void, but the principal is liable to an action. Lord Holt held, that, in an action of deceit, for selling one sort of silk for another, upon evidence that there was no actual deceit in the defendant, but that it was in his factor beyond sea, the merchant was liable: *Hern v. Nichols*, 1 Salk. 289.” [CRESSWELL, J.—*117] *Hern v. Nichols* was a case of misrepresentation, not fraud: the defendant there adopted the act of the factor.]

JERVIS, C. J.—Throughout the course of the argument, I must confess I have never entertained any doubt as to the decision we ought to arrive at in this case. The rule must be discharged. I take it for granted,—indeed, Mr. *Phipson* concedes it,—that it was known to

(a) Reversed on error in the Exchequer Chamber,—*Wilson v. Fuller*, 3 Q. B. 1009 (E. C. L. R. vol. 43), 3 Gale & D. 570.

Riches that it was Coleman's usual course of business to direct all corn purchased by him at the Bristol market to be delivered for shipment at Riches's wharf, and to pay the vendor the price on production of the wharfinger's receipt for the goods. But it is not pretended that there was any contract as between Coleman and Riches, that, in consideration that the former would cause his purchases to be delivered at the wharf of the latter, the latter should on the receipt of the goods give such vouchers as the former might act upon. If there had been any such contract, a very different question might have been raised; for, in that case, it might possibly have been said that the wharfinger had undertaken to employ competent persons faithfully to perform that duty. This, however, is simply the case of a wharfinger's receipt-note: and, that being so, the case is disposed of. Board, the defendant's agent, had only authority to give receipts for goods which had in fact been delivered at the wharf. Many cases are put in Dr. Story's excellent treatise on the law of principal and agent, where the principal has been held liable for acts done by the agent; but all of them were decided upon grounds which are totally distinguishable from the present case. It may be in the recollection of many that numerous actions were brought and criminal informations obtained against news-agents for libels contained in newspapers sold by *their servants over the counter: the liability of these persons was put by Bayley, B., in [*118 *The Attorney-General v. Siddon*, upon the ground that the servant was acting strictly within the scope of his employment, and consequently the master was liable for his act. So, where bakers have been held to be liable criminally for the excessive and exorbitant use of alum in making bread, the masters were held responsible for acts done by their servants in the ordinary course of their employment. So also in the various cases against brewers for the illegal use of drugs in their trade. So, in the case of a servant negligently driving his master's carriage. All these cases rest upon a sufficiently intelligible principle. But we must look here at the surrounding circumstances; and, when we find no *actual* authority in the agent to do the act complained of, we must see whether the facts warrant the inference that in doing it he was acting within the scope of the authority conferred upon him by his general employment. When Board gave a receipt for wheat which had never been delivered at the wharf, he was not acting within the scope of his authority: he was not acting for his master, but contrary to his duty, and against his master's interest. If this court decided correctly, in *Grant v. Norway*, 10 C. B. 665 (E. C. L. R. vol. 70), that the master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed,—the agent, Board, in this case, could not, by professing to act for the defendant,

confer upon himself an authority which the receipt of the wheat alone could give him. *Grant v. Norway* was acted upon by the Court of Exchequer in *Hubbersty v. Ward*, 8 Exch. 380;† and in truth it was *119] a mere illustration of a well-known rule of law. *I therefore think we are precluded by authority, and consequently that the rule to set aside this nonsuit must be discharged.

GRESSWELL, J.—I also think there is no ground for disturbing the nonsuit in this case. Mr. *Gray* has laboured to show that there was a course of dealing,—I presume he means a contract,—under which the wharfinger's receipt was given to enable the seller of the corn to obtain the money. But I have looked carefully through the evidence, and have failed to discover anything from which we can infer any such course of dealing as would render the defendant liable to the plaintiff for the fraudulent representation of his agent. To do so, we must assume that there was some contract between the parties that a receipt should be given only upon the delivery of the corn, in order that the plaintiff might be protected from paying for it before it was sent. There clearly was no evidence to warrant that. It may be true that Coleman was in the habit of paying for the corn he purchased, upon the production of a receipt vouching for its delivery at the wharf, and that Riches knew it. But the defendant had nothing to do with the plaintiff's manner of conducting his business. It leaves the case just as it was before. Was there, then, any actual authority in Board to bind the defendant by his representations? Certainly not. Then, was the situation of Board such as to bring the act in question within the scope of his authority? I think it was not. He was not employed to represent that to be true which he knew to be false. With respect to the case put of a warranty by a servant on the sale of a horse, I find that Ashhurst, J., says, in *Fenn v. Harrison*, 3 T. R. 760,—“I take the distinction to be, that, if a person keeping livery-stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant *120] *him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognisant of any private conversation between the master and servant; but, if the owner of the horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the order, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment.” And, as the authority of Bayley, B., has been vouched for the more extreme doctrine, I would refer to *Pickering v. Busk*, 15 East, 38, where that learned judge says: “If the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound, because the servant, having a general authority to sell, is in a condition to warrant,

and the master has not notified to the world that the general authority is circumscribed." Here there was no actual general authority, nor anything to justify us in inferring that any existed. The case, therefore, falls precisely within *Grant v. Norway*, and the nonsuit must be sustained.

WILLIAMS, J.—I am of the same opinion. I do not feel at all inclined to dissent from the doctrine in *Story on Agency*, § 456, where it is laid down that "the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit." Assuming that to be good law, the question is, whether the act of Board in respect of which responsibility is here sought to be cast upon the defendant, was an act done by him in the course or within the scope of his employment. I think we cannot so hold without *departing from the decision of this court in [**121 Grant v. Norway*. It is said that that case is distinguishable from the present, because it was put upon the ground of the general understanding of the commercial world. There is no commercial usage or understanding that the fact of goods being put on board shall be treated as an incontrovertible fact merely by reason of the master's having signed a bill of lading. So, here, I see no ground upon which the plaintiff could be justified in assuming as an incontestable truth that the wheat had been delivered by Lewis at the defendant's wharf, because the fact was so stated in the receipt. If there had been evidence of an agreement between the plaintiff and defendant that the latter should furnish the vendors with receipts on the delivery of the corn, upon the faith of which receipts the former should pay the price, I must confess I should have felt great difficulty in saying that the defendant would not be liable for the fraud of an agent intrusted by him with the business of the wharf, by means of which the plaintiff had been induced to part with his money on the faith of such delivery having actually taken place. But there was no evidence whatever of any such agreement. It seems to me, therefore, that the case is governed by *Grant v. Norway*, and that the rule must be discharged.

CROWDER, J.—I am of the same opinion. The whole question turns upon whether Board was acting within the scope of his authority. It appears that Coleman was in the habit of purchasing corn at the Bristol market, and directing the sellers to deliver it for him at the defendant's wharf, and that the defendant, on the delivery of the wheat, gave receipts for it, and that the plaintiff, when the defendant's receipt vouching for the delivery of the corn at his wharf was produced to him, usually paid the seller the price of it. That is all that I *can [**122 gather from the report which has been furnished to us by the learned judge who tried the cause. I find nothing whence we can infer that there was any contract or agreement between the plaintiff and the*

defendant that a particular receipt should be given, upon the faith of which the plaintiff was to pay the money. That disposes of a considerable portion of the argument. Then arises the question as to Board's conduct. He fraudulently gave a receipt importing that a quantity of wheat had been delivered by Lewis at the wharf on the plaintiff's account, when in truth none had been delivered. Was that an act which was within the scope of his authority as agent? Clearly not. *Grant v. Norway* is directly in point; and that, indeed, was a much stronger case, for, the captain of a ship has to a certain extent a general authority to bind his owners in matters relating to the management of the ship. It was argued there that the master is the general agent of the owner to conduct the business of the ship, and that part, and a most material and responsible part, of that business, is, the signing of bills of lading, and therefore that the owner must be responsible for the act of the master in signing a bill of lading, just as if he had signed it himself. But the court held that the master's authority was limited to the performance of all things usual in the management of the ship, and that it was not usual for him to sign bills of lading for goods not put on board, and therefore that a party taking a bill of lading must be assumed to take it with notice of such limitation of the master's authority. I am not prepared to say that that was a wrong decision: and it is a very strong authority to show that a person in the position of this man could have no right to bind his employer by an acknowledgment of the receipt of goods which had not actually come to hand. This is the case of a servant whose only duty was, to give a receipt when the goods

*123] *had been delivered. Board clearly was not acting within the scope of his authority, and therefore the nonsuit was right.

Rule discharged.

That the liability of a master does not extend to acts committed by the servant out of the course of his employment: *Foster v. Essex Bank*, 17 Mass. 479; *Kerns v. Piper*, 4 Watts, 222; *Southwick v. Estis*, 7 Cushing, 277; *Wilson v. Peverly*, 2 New Hamp. 548; *Brown v. Purviance*, 2 Har. & Gill. 385; *M'Clenaghan v. Brock*, 5 Rich. 385; *Harris v. Nicholas*, 5 Munford, 519. *Purveyor v. Thompson*, 5 Humphreys, 397; *Campbell v. Stairt*, 2 Murphy, 389; *Armstrong v. Cooley*, 5 Gilman, 509; *Tuller v. Voyt*, 13 Illinois, 277; *Moore v. Sanborne*, 2 Michigan, 519.

TOWNS and Another v. JOSEPH MEAD. Jan. 18.

Under the 4 Anne, c. 16, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, the statute of limitations does not run till his return or death, though the others have never been absent from the kingdom.

THE plaintiffs sued the defendant, by virtue of a writ issued on the 6th of October, 1853, "for money payable by the defendant to the plaintiffs for goods sold and delivered by the plaintiffs to the defendant at his request, and for money paid by the plaintiffs for the use of the defendant, at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between the plaintiffs and defendant;" and the plaintiffs claimed 110*l*.

The defendant pleaded "that the alleged cause of action did not accrue within six years before this suit."

Replication,—that the causes of action in the declaration mentioned accrued against the defendant, one George H. Mead, and one John Mead, jointly; that the said George H. Mead was in parts beyond the seas, to wit, in Canada, when the said causes of action accrued to the plaintiffs, and there remained from the time of the accruing of the said causes of action until his death; that this action was commenced within six years from the death of the said George H. Mead, and that the said John Mead was also dead when this action was commenced, having died before the said George H. Mead; and that the defendant was in England for several weeks on two occasions after the causes of action accrued, and in the lifetime of the said George H. Mead, and more than six years before the commencement of the action, and the *plaintiffs then had notice thereof, and saw and conversed with the [*124 defendant at two several times on those occasions.

The defendant demurred to this replication, the ground stated in the margin being, "that it is no answer to the statute of limitations, pleaded by the defendant, to say that he had a partner abroad." Joinder.

Bovill (with whom was *Byles*, Serjt.), in support of the demurrer.—This demurrer raises the simple point, whether, where there are two partners, and one is abroad at the time a cause of action for a debt accrues against them, the plaintiff may sue the partner who has always remained in this country, at any time, without reference to the statute of limitations. It involves a question of vast importance, applying to every mercantile firm having partners abroad. This action is brought against Joseph Mead, in respect of a claim which existed against him more than six years before the commencement of the action, viz. in 1844, and upon which he might have been sued at that time. [*JERVIS*, C. J.—The power to sue does not affect the statute. A feme covert or a prisoner would not be incapacitated from suing.] The true tests are,—was there a person capable of suing?—was the defendant liable to be sued?—did a cause of action exist for which he could have been sued?—

and were there the means of bringing the defendant into court? What is the rule as to plaintiffs? If one be here and others abroad at the time the cause of action accrues, an action must be brought upon it within six years: *Perry v. Jackson*, 4 T. R. 516. The reason for that is thus given by Lord Kenyon: "Two of the plaintiffs in this cause have always been resident here; and it was their duty to watch over those interests in which they themselves were equally concerned with the partner who resided abroad. It is admitted that one partner may *125] do several acts to bind the interests of all: he may release as well as create a debt: he may also by his acknowledgment take a case out of the statute of limitations: and I see no reason why the same rule should not hold also in the present instance. The 3d section of this act of parliament limits the time of bringing actions on the case, in all cases, to six years after the cause of action accrues; the plaintiffs therefore were bound to commence their action at an earlier period, unless they come within the exception in the last clause of the act, by which it is enacted, 'that, if any *person or persons* entitled to such actions, &c., be beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they take the same within such time as before limited after their return from beyond the seas, as other persons having no such impediment might have done. Now, the words of this clause, grammatically speaking, do not apply to the present case: they only extend to cases where the person individually, a single plaintiff, or *persons* in the plural, when there are several plaintiffs, are not in a situation to protect their interests. Neither does this case come within the policy of the law, which provides, that, if parties neglect their interests for such a length of time as six years, they shall lose the benefit of suing to enforce their demands." [WILLIAMS, J.—That case is put upon the exception in the statute of James, not on general principles. But, how do you distinguish this case from *Fannia v. Anderson*, 7 Q. B. 811 (E. C. L. R. vol. 58), where it was distinctly decided, that, under the statute 4 Anne, c. 16, s. 19, if a right of action accrue against several persons, one of whom is beyond the seas, the statute of limitations does not run till his return, though the others have never been absent from the kingdom.] That case proceeded upon this ground, that the defendant never could be brought into court at all: the rejoinder,—which the court held to be bad,—was, that the pro- *126] mise was made by the defendant jointly with one W., and that, after the accruing of the cause of action, and more than six years before the commencement of the suit, W. was in the kingdom, and might have been sued. [CRESSWELL, J.—Here, you say the defendant was *always* in this country?] He was here twice: but it simplifies the case to say he was here always. The argument in that case was,—*you*, the defendant, never were here at all, and consequently never could be brought into court; and therefore you cannot be heard to say that the

statute of limitations ran against the debt. Lord Denman, in delivering the judgment of the court,—after referring to *Perry v. Jackson*, and the reason there given by the court,—says: “With respect to the defendants, however, the reason does not apply. The plaintiff cannot bring the absent defendants into court by any act of his: and therefore, if he be compelled to sue those who are within seas within six years, without joining those who are absent, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent. On the other hand, if he sues out a writ against all, and either continues it without declaring, or proceeds to outlawry against the absent parties, and declares against those who are within seas, he is placed in precisely the same situation as if the statute of Anne had never passed, and obliged to incur fruitless expense, the avoiding of which seems to have been the object of the statute of Anne. That statute cannot have been passed in order to keep the plaintiff’s remedy alive; for, such object was easily attained before the statute, by suing out a writ and continuing it. We think that the statute intended to render such a form unnecessary, wherever, by reason of the absence beyond seas of any of the intended defendants, the plaintiff cannot have his complete remedy against all those whom he is entitled to sue, and whom indeed he would be bound, under the risk of a *plea in abatement, to sue if they were within the jurisdiction of [*127 the courts in England.” Those general observations have no application to the case now before the court. In *Rhodes v. Smethurst*, 4 M. & W. 42,† it was held that it was no answer to a plea of the statute of limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate), an executor of his will was not appointed until after the expiration of six years, and that the plaintiff sued such executor within a reasonable time after probate granted. Alderson, B., there says: “It appears to me, that, if the statute begins to run, it must continue to run,—that is to say, as soon as there is a cause of action, a plaintiff that can sue, and a defendant that can be sued in England, from that time the date of six years begins to run.” In *Fannin v. Anderson*, also, the court held that the words “or any of them,” in the 19th section of the statute of Anne, refer to the actions and not to the persons. [CRESSWELL, J.—That must be a mistake; they decide for the plaintiff.] They decide for the plaintiff because there was no ability to sue *the defendant* until he returned into this country. [CRESSWELL, J.—They *decide* the case as if the words “or any of them” applied to the persons: for, they say: “The statute of Anne cannot have been passed in order to keep the plaintiff’s remedy alive; for, such object was easily attained before the statute, by suing out a writ, and continuing it. We think that the statute intended to render such a form unnecessary, wherever, by reason

of the absence beyond seas of *any* of the intended defendants, the plaintiff cannot have his complete remedy against ~~all~~ those whom he is entitled to sue, and whom indeed he would be bound, under the risk of a plea in abatement, to sue, if they were within the jurisdiction of the courts in England." In *Williams v. Jones*, 18 East, *489, it was *128] held, that, though the cause of action accrued within the jurisdiction of the Supreme Court at Calcutta, while both the parties were resident there, and by the King's charter, granted in pursuance of the statute 13 G. 3, c. 63, that court is authorized to exercise the same jurisdiction in civil cases, as is exercised by the Court of King's Bench within England by the common law thereof; and assuming that by such authority the provisions of the statutes of limitations 21 Jac. 1, c. 16, s. 7, and 4 Anne, c. 16, s. 19, are transferred to India as part of the law of England auxiliary to the common law; yet, by the express terms of the savings in those statutes, as applicable to the courts here, the plaintiff's right of action upon an assumpsit is saved, if he (having returned home before the defendant) commence such action within six years after the defendant's return home, though more than six years had elapsed in India after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the court in that country. [CRESSWELL, J.—That has been decided over and over again. What is the nature of the liability of partners or joint-contractors by the law of England?] Lord Tenterden, in *Richards v. Heather*, 1 B. & Ald. 35, says,—“By the law of England, where several persons make a joint contract, each is liable for the whole, although the contract be joint.” For purposes of procedure, the law says the form of the action shall be against all, though, after judgment, payment may be enforced against any one. The subject is discussed in the notes to *Cabell v. Vaughan*, 1 Wms. Saund. 291, et seq. In the year 1844, the present defendant was in this country, and might have been sued, and from that liability he never could have relieved himself, for he could not, since the 3 & 4 W. 4, c. 42, s. 8, have pleaded in abatement: and it is the same cause of action in respect of which the defendant sues out his writ in 1853. [MAULE, J.—What you have to maintain is this, that, at the end of six *years, the partner being abroad, the debt was barred against *129] the now defendant. JERVIS, C. J.—Suppose George Mead, instead of dying abroad, had returned to this country after the remedy was, as you contend, barred as against the now defendant,—would it be barred as against both?] It may be conceded that it would not. [MAULE, J.—Then, do you deny the universality of the rule, that, where there is a right of action upon a joint contract, if the plaintiff is barred as against one defendant, he is barred as against the other too?] Yes: bankruptcy is one exception. [WILLIAMS, J.—That is by force of the statute. MAULE, J.—Suppose an action brought against one of two joint-contractors, and judgment for the defendant, and the plaintiff

afterwards sues the other, could he plead the judgment in bar?] There can be little doubt, that, in the case put, the judgment would be a bar: *King v. Hoare*, 13 M. & W. 494.† [MAULE, J.—A release of one certainly would.] From 1844 until the present time there is nobody but the present defendant who could have been sued in respect of this cause of action. Suppose A. and B. in America contract a debt with C. in England, the statute of James barred the remedy against them if they remained abroad more than six years. Then comes the 4 Anne, c. 16, s. 19, which is an enabling provision, and which enacts, that, “if any person or persons against whom there is or shall be any cause of suit or action of trespass, &c., or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be at the time of any such cause of suit or action given or accrued, fallen, or come, beyond the seas; that then such person or persons who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person and *persons after their return from beyond the seas,—so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this act and by the said other act,” 21 Jac. 1, c. 16. What is the event which is to enable the plaintiff to avail himself of that provision? Must all the joint-contractors come to this country? or, may the plaintiff sue if any *one* of them comes? [MAULE, J.—He *may* sue him, but he is not bound to do so.] If he *may* sue him, the proper construction of the statute would seem to be, that the action must be brought within six years of the return of the co-contractors, *or either of them*. [CRESSWELL, J.—Suppose one returned in 1850, and the other in 1854, the six years having then elapsed, could the plaintiff sue the one who returned in 1854?] He might sue either within six years of the return of each. [CRESSWELL, J.—May he not sue both when the first returns? or, may he not sue both in 1854?] He might, it is submitted, in either case, sue both. [CRESSWELL, J.—Suppose one dies instead of coming back?] In that case the survivor might be sued at any time within six years after *his* return. Assuming that the 18th section of the statute of Anne means that the plaintiff must sue within six years after the return of any one of the persons against whom he has a cause of action, the statute of James is a bar, because here the defendant returned more than six years before the commencement of the action. If, on the other hand, the return of all is a condition precedent to his right to sue, that right has never accrued, inasmuch as all have not returned. In either view, therefore, the plaintiff's claim is barred.

J. H. Hodgson, contra.(a)—*Fannin v. Anderson* is a *distinct [*131

(a) The points marked for argument on the part of the plaintiffs, were as follows: “The plaintiffs will contend, that, if a contractor be beyond the seas at the time of the accruing of the

authority to show that the present case is by force of the 19th section of the statute of Anne, taken out of the operation of the statute of James. It may be doubted whether, one of the joint-contractors having died abroad, the plaintiff was limited to any particular time for suing the survivor: but, at all events, he was not bound to sue earlier than within six years of the death. Being clearly within the last branch of the section, he had a right to wait until all came back. "Cause of action," says Tindal, C. J., in *Douglas v. Forrest*, 1 M. & P. 690, 4 Bingham 704 (E. C. L. R. vol. 13), "is, the right to prosecute an action with effect." And it cannot be said that a man who has a cause of action against two or more joint-contractors, can prosecute his action with effect, where one or more of the intended defendants is or are abroad. At the time the statute of Anne passed, the non-joinder of a co-contractor was matter of plea in abatement,—*Anonymous*, 3 Smith, 318. If the effect of the statute of Anne is to except the statute of James only in cases where *all* the defendants are abroad, the plaintiff will derive no benefit from it at all. That statute was designed to obviate the difficulties which are adverted to in the judgment of the Court of Queen's Bench in *Fannin v. Anderson*, and to save the plaintiff's remedy in all cases until *all* the defendants were within the jurisdiction. The words "or any of them" in the 3d section of the 21 Jac. 1, c. 16, refer to the actions, nothing else being there spoken of: but, in the 19th section of the 4 Anne, c. 16, the first part of which is nearly the same as *182] *the 7th section of the former act, where they are not found,—unless those words apply to the "person or persons," they have no application at all. Upon the plain words of the statute, therefore, the plaintiff is entitled to the judgment of the court upon this replication, which meets all the requirements of the act. In *Townsend v. Deacon*, 3 Exch. 706,† it was held, that, where a person dies abroad, to whom a right of action has accrued during his residence there, and he never returned to this country after the accrual thereof, his executors may sue for it, although more than six years have elapsed since it accrued. Parke, B., there says: "The 7th section of this statute extends the period for bringing the action to all persons who are infants, femmes coverts, non compotes mentis, imprisoned, or beyond the seas, and enables all such persons to sue within the times previously limited, the time to be reckoned from the moment when they become of age, discover, &c. It is quite clear that each of these persons might have brought the action within those respective times, and it appears to me that their executors might equally do so, as standing in the same position, and possessing the same rights. It also appears to me, that the opinion of the court in the case of *Strithorst v. Græme*, 3 Wils. 145, which has been referred to,

cause of action against him and his co-contractors, the right of action against all is saved from the 3d section of the 21 Jac. 1, c. 16, by the operation of the 19th section of the 4 Anne, c. 16: and the plaintiffs will rely, as well upon the words of the statute, as upon the case of *Fannin v. Anderson*, 7 Q. B. 811 (E. C. L. R. vol. 53).

in effect decides the present case. In the case of a person who never comes to England, it is questionable whether the executor does not retain all his rights under the 7th section: but, as that question does not arise here, where the action has been brought within six years, it is unnecessary to decide it. I am inclined in such case to think that the executor is under no restraint whatever."

Bovill, in reply.—The statute of James having positively prohibited the bringing of any action after the expiration of the times limited, except the plaintiff be *under any of the disabilities pointed out and [133 provided for in the 7th section, then comes the statute of Anne, the 19th section of which enables the plaintiff to sue after the expiration of six years, on condition that he bring his action within six years from the happening of an event provided for, viz., the return to this country of the person or persons against whom he has cause of action, or any of them. [MAULE, J.—There being two joint-contractors, one being abroad at the time the cause of action accrued, the other here, and more than six years having elapsed,—the question is, can the plaintiff now sue the one who has always been in this country.] The co-contractors having died abroad, the statute of Anne does not take effect at all: consequently, the case must be governed by the 21 Jac. 1, c. 16, which clearly bars the plaintiff's right of action.

JERVIS, C. J.—I am of opinion that the plaintiffs in this case are entitled to judgment. I alone am responsible for the reasons upon which that opinion is founded, though I believe there will be no difference between my learned Brothers and myself as to the result. I feel no difficulty in accepting the broad proposition as put by Mr. *Bovill*. Substantially, the facts stated on the record are these:—Here are two joint-contractors, A. and B. A. was abroad at the time the cause of action accrued, and remained abroad until his death. B. was in this country at the time of the accruing of the cause of action, and has remained here ever since. The question is whether the plaintiff's remedy is barred by the statute of limitations. I am of opinion that it is not. Looking at the statute 21 Jac. 1, c. 16, alone, no doubt the plaintiffs' remedy would be gone. If, as Mr. *Bovill* has contended, the statute of James has taken away the remedy, and the statute 4 Anne, c. 16, s. 19, is a mere enabling statute, the plaintiffs' cause of action would of course be *barred. But I do not think that is the true construction of the [134 statute of Anne. The 19th section of the statute of Anne in substance provides, that, if any person or persons shall happen to be abroad at the time of the accruing of the cause of action against them, the plaintiff shall be at liberty to bring his action against such person and persons within six years after their return from abroad. In my opinion, that in effect is an exception out of the statute of James, and not an enabling provision. At the time of the passing of this statute of Anne, it was well known that you could not effectually sue one of several joint-contractors

without joining the others. The bare giving liberty to sue one who is abroad at the time the cause of action arises, within six years after his return from abroad, while it relieves you from the necessity of suing the absent party, indirectly takes away the operation of the statute of James, because you cannot give leave to a plaintiff to sue one of several joint-contractors on his return from abroad, unless you suspend the remedy against all at the same time; and, if so, the statute never runs at all. If the statute of Anne be construed strictly, the statute of James would never operate at all as against joint-contractors some of whom may be abroad at the time of the accruing of the cause of action, until their return to this country. But perhaps, on the equitable construction of the act,—and that is the construction I adopt,—the plaintiff would be bound to sue those who remain in this country within six years after the death of the absent co-contractor. Some difficulty was suggested in the course of the argument, as to the meaning of the words “or any of them” in the 19th section of the 4 Anne, c. 16. I do not think it at all important to put any construction upon those words. Whether they got in by accident, or were designedly inserted, it is not worth while to *135] consider, because I think the first words of the section,—“if any *person or persons,” &c., are amply sufficient to let in the construction I put upon the statute. For these reasons, it appears to me that the 19th section of the 4 Anne, c. 16, is an exception out of the statute of James, and not an enabling clause engrafted upon it. I think the plaintiffs are entitled to the judgment of the court.

MAULE, J.—I also think that the plaintiffs in this case are entitled to judgment. The question arises on the construction of the 19th section of the statute of Anne, following the 3d and 7th sections of the statute of James. By the 3d section of the statute of James, a plaintiff is disabled from bringing an action upon any contract, where more than six years have elapsed after the cause of action accrued. That statute has no relaxation of its strictness in the case of a *defendant* being absent from this country at the time the cause of action accrued. The statute of James considered it right that *plaintiffs* should not be barred whilst labouring under certain disabilities or impediments; one of which is, the plaintiffs' being absent beyond the seas at the time of the accrual of the cause of action; and therefore provided, in s. 7, that the period of limitation should not commence running against them until the impediment was removed. But there was no provision for cases where the *defendant* was absent from England. In that case, the plaintiff knows that he has a cause of action, and he would know upon inquiry that the defendant was not to be found in this country. Still, however, he was not without remedy: he might issue his writ, and continue it by alias and pluries, and so forth, until the defendant's return, or he might proceed to outlawry against him. But a plaintiff would be left in this situation. Having a cause of action

against several, some one or more of whom were abroad, he could not safely do otherwise than issue process within *the six years, and then proceed by one of the courses I have suggested. That [*136 would be expensive, and might be inconvenient, because it might be that the parties here might be quite willing to pay. To supersede that necessity, the statute of Anne, in s. 19, says, that, if any person or persons against whom there is or shall be any cause of suit or action of trespass, &c., &c., or any of them, be or shall be, at the time of any such cause of suit or action given or accrued, fallen, or come, beyond the seas, then such persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, so that they take the same after their return from beyond the seas within such times as are respectively limited for the bringing of the said actions before by that act and by the 21 Jac. 1, c. 16,—qualifying the prohibition contained in the statute of James. As I read that section, the words “or any of them,” mean any of the persons against whom there is or shall be any cause of action. It is true, that the same words in the 3d section of the 21 Jac. 1, c. 16, refer to the actions thereinbefore enumerated, no persons having been mentioned. But in the 19th section of the statute of Anne, the words “or any of them,” though coming after the mention of a long series of actions, cannot mean “or any of the said actions,” for that has been said before; “or” occurring between every two of the sections enumerated. To give any application at all to those words, therefore, I think they must be held to refer to persons. It would be a very inconvenient construction to hold, that, in a case where there are several joint contractors resident abroad, and one in this country, the plaintiff is to be barred by the statute as against all if he does not sue that one, when, if he had sued him formerly without the others, he would have been met by a plea in abatement: and it *would be still more monstrous since the recent [*137 statute abolishing pleas in abatement.(a) It seems to me that the proper meaning of this statute is this, that, so long as the absence of the defendants, or of any of the defendants, places the plaintiff at a disadvantage, his remedy shall not be barred: but that, when that disadvantage is removed, the statute shall commence running, and if he abstains from suing within the time limited, his claim should be barred. The result is this:—The statute of James says that the action shall be brought within six years next after the cause of action, and not after. Then the statute of Anne says, that, if by reason of any of the defendants being beyond the seas at the time the cause of action accrues, the plaintiff cannot bring his action so properly and conveniently as he could if all the parties were in this country, the defendants shall not avail themselves of that absence abroad to bar or defeat the plain-

(a) See 3 & 4 Will. 4, c. 42, s. 8.

tiff's remedy. The effect, therefore, is, practically to repeal the statute of James, or to suspend its operation so long as the defendants or any of them remained abroad. But the 19th section of the statute of Anne goes on to say that the former part shall not operate unless the suit is commenced within six years of the absent defendant's return to this country. The effect of that, I apprehend, is, that the bar which is taken away by the former part of the section, shall, when that absence ceases, no longer subsist, and consequently the plaintiff is remitted to the position of a person who is not barred, and whose cause of action is given back to him. But, if there be no return of the absent defendant to this country, the case provided for by the last clause of the 19th section of the statute of Anne does not arise. A defendant being abroad, the statute applies. That operates as an answer to the statute of *138] James. But the plaintiff may reply that the *absent defendant returned to this country, and that the action was commenced within six years after his return. That operates as an exception out of the repeal of the statute of James; but it is an exception that is contingent only upon the defendant's return. That is manifestly the plain justice of the case, and the words are capable of receiving that construction. As soon as the absent defendant dies, the case of the co-contractor being abroad, no longer subsists, and the plaintiff has a right to bring his action at any time within six years after the death,—if that be a condition, which it is unnecessary to decide. Here, the case contemplated by the statute of James has occurred: but, at the time of the accruing of the cause of action, one of the defendants was abroad. I am rather disposed to consider that the cause of action cannot be said to have accrued within six years, where it is brought against an executor or a person who could not be sued alone within the six years. I think in this case the debt was not barred.

CRESWELL, J.—I am of the same opinion. The 3d section of the 21 Jac. 1, c. 16, absolutely provides that all actions upon contracts shall be brought within six years. It may be said, therefore, with reference to the 7th section of the statute of James, as much as with reference to the 19th section of the statute of Anne, that, after the 3d section of the former act has prohibited the bringing of an action after the lapse of six years, the subsequent section, which enacts that, when the plaintiff is under certain disabilities at the time of the accruing of the cause of action (absence from England being one of them), he shall have six years from the removal of the disability, is an enabling section. Mr. *Bovill* would argue that the return of the plaintiff to this country is a condition precedent to his right to sue, and that he must of necessity come back in order *139] to avail himself of that provision. But it has been decided in several cases that that is not so: a plaintiff, though abroad, *may* sue, but he is not obliged to do so. This appears from several authori-

ties referred to, and no doubt correctly stated in 2 Williams's Saunders, 121. But, under the statute of Anne, no right can exist until the party's return. Then comes the question whether the words "or any of them" in the 19th section of the statute of Anne, apply to the persons or to the actions before mentioned. It is unnecessary for us to decide that question; for, I think, that, independently of those words, the rest of the section sufficiently meets this case. The meaning of the statute seems to me to have been correctly given by the Court of Queen's Bench in *Fannin v. Anderson*. Lord Denman there says,—“The statute intended to render such a form (viz. suing out a writ, and continuing it) unnecessary, whenever, by reason of the absence beyond seas of any of the intended defendants, the plaintiff cannot have his complete remedy against all those whom he is entitled to sue.” So, here, the statute having given leave to sue within so many years, and not after, and having then provided that persons under certain disabilities should be allowed the same period for suing after the removal of the disability, must have intended the disability should not attach so long as the plaintiff could not effectually sue any one, owing to the absence of others of the co-contractors. So long as one of the defendants remained abroad, the disability continued, and the statute of limitations did not run. Consequently, at the time George Mead died, the action was not barred by lapse of time. Whether or not it was necessary for the plaintiff to sue within six years after George Mead's death, I forbear to decide. It is enough to say that I adopt the view of the Court of Queen's Bench in the case of *Fannin v. Anderson*, and therefore the plaintiff must have judgment.

*WILLIAMS, J.—I am of the same opinion. I think the present case is substantially governed by *Fannin v. Anderson*. That [*140 was a well considered judgment, and ought to bind us. Before that, it had been held in *Perry v. Jackson*, 4 T. R. 516, upon the construction of the 7th section of the statute of James, that, if one plaintiff be abroad, and the others in England, the action must be brought within six years after the cause of action arises. But, in *Fannin v. Anderson*, the Court of Queen's Bench decided, that, although the words are nearly the same, a different construction must from the reason of the thing be given to the 19th section of the statute of Anne, and that that statute applies to all cases in which by reason of any one of the defendants being beyond seas at the time of the accrual of the cause of action, the plaintiff is deprived of his complete remedy against all, and that he was not bound to issue his writ against some or one of them at the peril of a plea in abatement. Mr. *Bovill*, in the course of his very ingenious argument, has pressed us with the case of a cause of action accruing against two joint contractors who are both abroad at the time, and one returns to this country at one time, the other at another time. I am unable to see the force of that; for, it seems to me, on the autho-

rity of *Fannin v. Anderson*, to be perfectly clear that the plaintiff would not be bound to sue until the return of the second, and then he would have six years from the return of that one. But a difficulty, I must confess, arises from the words of the statute. At the time of the passing of the statute of Anne, it had been held that the statute of James did not apply where the debtor or one of the debtors was abroad at the time of the accruing of the cause of action. Then came the statute of Anne, the 19th section of which enacts, that, "if any person or persons against whom there is or shall be any cause of suit or *141] action of trespass, &c., or of action of account, *or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be, at the time of any such cause of suit or action given or accrued, fallen, or come, beyond the seas,—that then such person or persons who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this act and by the said other act of 21 Jac. 1, c. 16." Now, the argument in favour of the replication in this case, is, that the present defendant must be considered as a person against whom a cause of action has accrued, and a person who was abroad at that time, and consequently the plaintiff was authorized to sue by the first part of the 19th section of the statute of Anne. But, taking the words of the latter part of the section literally, it would seem difficult to say that the case is within it, seeing that this is an action against Joseph Mead, who has been more than six years in this country, and not against a co-contractor who has remained abroad until within six years of the commencement of the action. Looking, however, at the object of the statute, the difficulty it was intended to remedy, and the previous decisions, there is, I think, enough to warrant us in holding, that, though not literally within the words of the 19th section, the case is within the equity. In *Douglas v. Forrest*, 4 Bingham 686 (E. C. L. R. vol. 13), 1 M. & P. 663, the statute of Anne was not alluded to. But, on that case being cited in *Rhodes v. Smethu.*, 4 M. & W. 51,† Alderson, B., said: "That was in truth a case not within the statute at all, because the debtor never returned from beyond seas; therefore the plaintiff might have sued him at any time during his life." *142] In *Story v. Fry*, 1 Y. & C. C. C. *603, a person in satisfaction of a previous debt due from him, gave his creditor a bill of exchange, and before the bill arrived at maturity went to India, whence he never returned: as soon as circumstances would permit after his death in India, his will was proved by his executors in England; and, within six years after his death, a creditors' bill was filed against the executors: and it was held that the plaintiff was not barred by the

statute of limitations. These decisions seem to me to justify the view presented on the part of the plaintiffs, which certainly is in accordance with what is laid down in *Chandler v. Vilett*, 2 Wms. Saund. 120, 1 Sid. 453, where it was held that the privileges by reason of infancy, and other impediments, are saved, in an action on the case on assumpsit, by the statute of limitations, 21 Jac. 1, c. 16, s. 8, and that that action is within the equity of the saving clause thereof (s. 7), though it is named in the limiting clause only. The same equitable construction of the statute was, upon the authority of that case, and of *Crosier v. Tomlinson*, 2 Mod. 71, applied in the case of a plaintiff who was in prison when the cause of action accrued, in a case of *Piggott v. Rush*, 4 Ad. & E. 912 (E. C. L. R. vol. 81), 6 N. & M. 376.

Judgment for the plaintiffs.

Where the statute of limitation is pleaded against non-resident joint plaintiffs, the fact that one of them has been in the state since the cause of action accrued, will not take the case out of the saving in favour of non-residents: *James v. Henry*, 3 Litt. 46.

In assumpsit against several defendants it is no answer to a plea of the

statute, that one of them, within six years from the accruing of the cause of action, departed from the state and continued absent until the commencement of the suit. All the persons liable on a joint contract must depart from the state, in order to stop the running of the statute: *Brown v. Delafield*, 1 Denio, 445.

*GRAY and Another v. KNIGHT. April 23. [*143

Where a rule for a special jury (obtained in due time) has been obtained for delay, the proper application to the court, is, for a rule to show cause why the cause should not be tried by a special jury, in its order, at the sitting for which the notice was given, if the defendant shall then have one in attendance, and, in default thereof, then that the cause be tried by a common jury.

THIS was an action of debt for money paid, interest, work and materials, and money found due from the defendant to the plaintiffs on accounts stated between them.

Pleas,—first, never indebted,—secondly, that the defendant before action satisfied and discharged the plaintiffs' claim by payment.

Issue was joined on the 27th of March last, and notice of trial then given for the first sitting in this term. On the 6th of April, the defendant duly obtained a rule for a special jury; but it was not served upon the plaintiffs' attorney until the 17th.

Norman, on the 19th instant, obtained a rule calling upon the defendant to show cause why the cause should not be tried by a special jury, in its order, at the first sitting at Guildhall in this term,—which was

the 24th,—on the ground that the rule for the special jury had been obtained merely for delay. Upon the rule coming on,

Quain, for the defendant, submitted, that, inasmuch as the trial was proposed to be had on the following day, there was no time to give the necessary notice for the attendance of a special jury. [JERVIS, C. J.—We cannot help that. *Mr. Norman* is entitled to bring the rule on.] The question is one of great importance, and fit to be tried by a special jury, relating to pretended sales of saltpetre which never in fact had any existence, or was intended to be delivered, and no money ever *144] passed between the parties, nor was any ever paid by the *plaintiffs at the defendant's request. [JERVIS, C. J.—We cannot try that upon affidavit. The only question upon this motion, is, whether or not the rule for a special jury has been obtained for delay.] The rule is objectionable in point of form: it calls upon the defendant to show cause why the cause should not be tried by a special jury in its turn; whereas, the 111th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, provides, “that, where the defendant in any case, or plaintiff in replevin, gives notice of his intention to try the cause by a special jury, and venue is in London or Middlesex, the court or a judge, if satisfied that such notice is given for the purpose of delay, may order that the cause be tried by a common jury, or make such other order as to the trial of the cause as such court or judge shall think fit.” [CRESSWELL, J.—The rule as drawn is founded upon the old practice of the courts: it rather amplifies the power of the court. We may, however, mould the rule now it is before us.]

Norman, in support of the rule, was stopped by the court.

JERVIS, C. J.—We must alter the rule. We misled *Mr. Norman* by our suggestion. The rule will be absolute for the trial of the cause by a special jury if the attendance of a special jury can be procured, if not, by a common jury.

The rest of the court concurring,

Rule absolute,—“that this cause be tried by a special jury, in its order, at the first sitting in this term, to be holden at the Guildhall, if the defendant shall then have one in attendance, and, in default thereof, then that this cause be tried by a common jury.”

*TOPPIN and Another v. LOMAS. May 1. [*145

Commissioners for a local improvement were incorporated by act of parliament, and empowered to borrow money on mortgage of the lands or funds acquired by them by virtue of the acts, or on bond. By a subsequent act, which provided a form of bond, it was recited, "that the commissioners had, pursuant to a power in that behalf contained in one of their acts, executed an indenture dated the 26th of May, 1852, for securing the performance of the condition of certain bonds granted pursuant to a deed of settlement of even date therewith, and therein referred to." The form of bond given by the act contained the following provisos:—Provided always, that the lands, tenements, money, property, and effects of the said commissioners, acquired and to be acquired under or for the purposes of the said acts, or any of them, shall alone be answerable to pay and satisfy the principal sum and interest secured by the above-written bond, and that no commissioner or other person shall in any case be personally liable to pay the same principal and interest, or any part thereof: provided also, that the above-written bond is granted by the commissioners to the intent that it may be entitled to the benefit of an indenture of mortgage dated the 26th of May, 1852, executed by the said commissioners under the authority of the above-mentioned acts, and may be subject to the powers and provisions of an indenture of settlement of the same date, referred to in the said indenture of mortgage:—

Held, that these bonds conferred upon the holder an interest in land within the meaning of the 4th section of the Statute of Frauds.

THIS was an action for the breach of a contract for the purchase of a bond or debenture of the Westminster Improvement Commissioners, granted pursuant to the Westminster Improvement Acts, 8 & 9 Vict. c. clxxviii., 10 & 11 Vict. c. cxxxi., 13 & 14 Vict. c. cii., and 16 & 17 Vict. c. clxxvi.

The declaration stated, that it was agreed between the plaintiffs and the defendant, that the plaintiffs should sell to the defendant, and that the defendant should buy of the plaintiffs, a certain assignable bond or debenture, under the common seal of the Westminster Improvement Commissioners, in the penal sum of 1000*l.*, conditioned for the payment of the sum of 500*l.* at the time and in the manner in the condition of the said bond or debenture mentioned, for the sum of 210*l.*; the said sale to be completed by the plaintiffs and the defendant respectively at the expiration of a reasonable time for the defendant to withdraw certain money from and out of a certain building society: Averment that such reasonable time had elapsed, and that the plaintiffs were ready and willing and offered to complete the sale, and requested [*146
*the defendant to buy the said bond, and accept and receive the same, and to pay the said price or sum of 210*l.* therefor; and that the plaintiffs had done all things necessary, and all things had occurred and happened, necessary, and all conditions precedent had happened and been performed, necessary to entitle the plaintiffs to have the defendant complete the said purchase, and buy, accept, and receive the said bond, and pay the said price or sum of 210*l.* therefor: Breach, that the defendant did not nor would, when he was so requested as aforesaid, or at any other time, complete the said purchase, &c.

There was also a count for money payable by the defendant to the plaintiffs for the sale of a transferable bond or debenture then bargained, sold, and caused to be assigned and transferred by the plaintiffs to the

defendant at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

Pleas,—first, to the first count, a traverse of the agreement,—secondly, to the same count, that the defendant was induced to enter into the agreement by the fraudulent representations of the plaintiffs,—thirdly, to the same count, that the contract was rescinded by mutual consent, before breach,—fourthly, to the residue of the declaration, never indebted. Upon these pleas issues were joined.

The cause was tried before Jervis, C. J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows :—

The plaintiffs, who were auctioneers and valuers in the city of London, inserted in the Times newspaper of the 20th of November, 1854, the following advertisement :—

"To be sold for 220*l.* each, debentures of the Westminster Commissioners for 500*l.*, secured upon freehold *property, and payable at par in 1857. Each yielding 25*l.* per annum. The purchaser will be entitled to the interest due on the 10th of January next. Apply to Toppin & Clark, auctioneers, &c., 7, Coleman Street, City."

On the same day, the defendant wrote to the plaintiff as follows :—

"Gentleman,—I beg to offer you 210*l.* for one of the 500*l.* bonds advertised in this day's Times."

One of the plaintiffs having called upon the defendant for the purpose of informing him that his offer was accepted, he, on the same day called at the plaintiffs' office, and asked when the money would be required to be paid ; upon being told that the money would be required in a week, the defendant objected to bind himself to that time, inasmuch as he would be unable so soon to withdraw the money from other securities ; one of the plaintiffs, however, wrote upon the defendant's letter, in his presence, "To be completed in a week."

On the 22d of November, the defendant gave notice that he declined to purchase the bond ; and on the following day the plaintiffs wrote to him as follows :—

"Sir,—In reply to your letter of the 20th instant, containing an offer of 210*l.* for a 500*l.* Westminster Improvement Bond, our Mr. Clark called upon you to give you notice that we accepted your offer. You subsequently called here, and asked what time we would give you to complete, and I said a week. If you do not complete the contract within one week, that is, by the 27th, we shall place the matter in the hands of our solicitors."

The defendant still refusing to complete the purchase, the plaintiffs again offered the bond for sale, and, having re-sold it for 200*l.*, brought this action against the defendant to recover the difference between that sum and the price he had agreed to give for it.

*The bond, it appeared, was in the form given in Sched. B. [*148 annexed to the 16 & 17 Vict. c. clxxvi., an ordinary money bond, but containing, amongst others, the following provisoes:—"Provided always, that the lands, tenements, property, and effects of the said commissioners acquired or to be acquired under or for the purposes of the said acts, or any of them, shall alone be answerable to pay and satisfy the principal sum and interest secured by the above-written bond; and that no commissioner or other person shall in any case be personally liable to pay the same principal and interest, or any part thereof: Provided also, that the above-written bond is granted by the said commissioners to the intent that it may be entitled to the benefit of an indenture of mortgage dated the 26th of May, 1852, executed by the said commissioners under the authority of the above-mentioned acts, and may be subject to the powers and provisions of an indenture of settlement of the same date, referred to in the said indenture of mortgage," &c.

On the part of the defendant, it was objected, that, upon the construction of the Westminster Improvement Acts,—and particularly the 37th section of the 8 & 9 Vict. c. clxxviii., the 49th section of the 10 & 11 Vict. c. cxxxi., the 18th section of the 13 & 14 Vict. c. cii., and the 64th and 75th sections of the 16 & 17 Vict. c. clxxvi.,—the contract in respect of the alleged breach of which this action was brought, was a contract "for or concerning an interest in land," within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, and therefore could not be enforced for want of writing.

For the plaintiffs, it was insisted, that the bond gave the holder no interest in or concerning land, so as to require the contract to be in writing; and that, if any writing were necessary, the correspondence between the parties, with the words written by the plaintiffs on the defendant's letter in his presence, constituted a *sufficient con- [*149 tract in writing to satisfy the Statute of Frauds.

His Lordship, after intimating a pretty strong opinion, that, by the terms of these bonds, the obligee acquired an interest in the land, directed a nonsuit to be entered; but he reserved to the plaintiffs leave to move to enter a verdict for 10*l.*, if the court should entertain a contrary opinion.

Byles, Serjt., moved accordingly.—By the 3d section of the first Westminster Improvement Act, 8 & 9 Vict. c. clxxviii., certain persons were incorporated by the name of "The Westminster Improvement Commissioners," who were thereby empowered "to purchase and hold lands for the purposes of the undertaking thereby authorized, within the district therein mentioned, and subject to the restrictions therein contained." The 37th section enacts, "that it shall be lawful for the commissioners from time to time to borrow at interest any sum of money which they shall judge necessary for the purposes of this act; and, for

securing the repayment of the moneys so borrowed, with interest, the commissioners, or any three of them, may *mortgage* the lands or funds acquired or to be acquired by them by virtue of this act, or any part thereof, to the person who shall advance or lend such money, or his trustee, as a security for the repayment of the money so to be borrowed, together with interest for the same,—or may secure the same by *bond* duly stamped." That act gives, in the schedule, a form of *mortgage*. The 49th section of the next act, 10 & 11 Vict. c. cxxxi., enacts "that it shall and may be lawful for the said commissioners, after such certificate of expenditure as to the said sum of 125,000*l.* as aforesaid shall have been obtained, from time to time to borrow at interest any sum of money which they shall judge necessary for the purposes of the said

*150] Improvement Act or this act, on *mortgage* of the moneys to be *received out of such rate or rates as aforesaid, or any part or parts thereof, and that the powers and provisos in the said Improvement Act contained relative to the borrowing of money on mortgage of the lands and funds in the said act mentioned or referred to, and the repayment of such moneys, and the assignment and registration of such mortgages or the transfers thereof, and the payment and reduction of interest thereon, shall be applicable to the mortgages by the said Improvement Act authorized to be made, in like manner to all intents and purposes as if the same were now repeated, with the necessary alterations only." The 50th section provides that the *bonds* shall be in the form given in schedule A.; and that form does not contain the proviso which creates the present difficulty, but only the first proviso. So far, therefore, these bonds are not a charge upon the land. Then comes the 13 & 14 Vict. c. cii., the 20th and 21st sections of which only are material. The 20th section recites, that, "whereas by the said 'Westminster Improvement Act, 1845,' it was enacted that it should be lawful for the commissioners from time to time to borrow at interest any sum of money which they should judge necessary for the purposes of that act; and, for securing the repayment of the moneys so borrowed, with interest, the commissioners, or any three of them, might mortgage the lands or funds acquired or to be acquired by virtue of that act, or any part thereof, to the person who should advance or lend such money, or his trustee, as a security for the repayment of the moneys so to be borrowed, together with interest for the same, or might secure the same by *bond* duly stamped: And whereas by the said 'Westminster Improvement Act, 1847,' power is given to the said commissioners to borrow money at interest, subject to the condition therein contained, on *mortgage* of the moneys to be received out of certain rates therein mentioned,"—enacts, "that, in all cases in which the

*151] *said commissioners shall borrow any money or moneys on the security of any *mortgage* or *bond*, under the powers and provisions of the said Improvement Acts or either of them, or of this act, it shall

be lawful for the said commissioners to secure the payment of the money or moneys so borrowed as aforesaid, with interest, to the person or persons lending or advancing the same, by a bond or bonds under the common seal of the commissioners, in addition to such mortgage, or by a mortgage in addition to such bond." And the 21st section enacts "that nothing therein contained should authorize the Westminster Improvement Commissioners to secure by a mortgage of or charge upon the moneys by the said 'Westminster Improvement Act, 1847,' authorized to be paid to them in respect of the increased rates therein mentioned, any sum or sums of money raised or borrowed by, or advanced to, or due from, the said commissioners previously to the 16th of November, 1849, or any part of such sum or sums respectively, or the interest thereof, or of any part thereof, respectively, or shall be construed to confirm or to authorize the said Westminster Improvement Commissioners to confirm any such mortgage or charge already made." That act, therefore, gives the bond-holders no *real* security, unless they have a mortgage in addition to the bond. The 64th section of the 16 & 17 Vict. c. clxxvi., enacts "that it shall be lawful for the said commissioners from time to time to borrow and take up at interest such sum or sums of money as they shall judge necessary for the purposes of this act; and the powers and provisions in the Westminster Improvement Acts, 1845, 1847, and 1850, and the acts incorporated therewith, contained, relative to the borrowing of money on mortgage or bond, and the repayment of such moneys, and the assignment and registration of such mortgages and bonds, or the transfers thereof, and as to the interest of such moneys, shall be *applicable to the mortgages and bonds by this act [152 authorized to be made, in like manner, to all intents and purposes, as if the same were repeated in this act, with the necessary alterations only; and that any bond to be given by the said commissioners as a security for moneys, under the powers for that purpose contained in the said Improvement Acts respectively, and in this act, may be according to the form in the Schedule B. to this act, or to the like effect, and shall be under the common seal of the said commissioners." The form given in the schedule contains the proviso which gives rise to this question. The 75th section,—reciting, that, "Whereas, pursuant to a power in that behalf contained in 'The Westminster Improvement Act, 1850,' the commissioners have executed an indenture, dated the 26th of May, 1852, for securing the performance of the condition of bonds granted pursuant to a certain deed of settlement of even date therewith, and therein referred to: And whereas the said indenture of mortgage affords an improved security to persons lending money to the said commissioners, and the powers and provisions contained therein, and in the said deed of settlement, will promote the advantageous letting of the land of the said commissioners, and will facilitate the completion of the undertaking," enacts,—“that all and

every the powers, provisions, and agreements contained in the said deed of settlement and indenture of mortgage bearing date respectively the 26th of May, 1852, except as hereinafter provided, shall be and are hereby confirmed. The bond in question is a money bond. It does not become a contract for an interest in or concerning land, merely because incidentally the obligee in a certain event may acquire a right of coming upon the land. A judgment-debt may be assigned by parol, and that too may incidentally become a charge upon the land. So of *153] a warrant of attorney. A question somewhat similar to this *arose in *Watson v. Spratley*, 10 Exch. 222.† By indenture Ellis granted to York, his executors, administrators, *co-adventurers*, and assigns, full license, power, and authority to dig, work, mine, and search for ore, minerals, and metals in and throughout certain limits, and the same to carry away and dispose of to their own use, for twenty-one years. The adventure was a joint-stock company conducted on the cost-book principle. York was purser of the mine, which was purchased with money raised by calls on the shareholders. The mode of transferring shares, was, by a certificate of the sale, addressed by the vendor to the purser, and countersigned with an acceptance of the shares by the vendee; on the receipt of which certificate, the purser substituted the name of the latter in the cost-book for that of the vendor. Sometimes the shareholders signed off their names in the cost-book; in which case they ceased to be shareholders, and there was paid to them the value of their shares, estimated with reference to the machinery and ore, but not the mine. It was held by Martin, B., and Platt, B., that shares in this company were not an interest in land within the 4th section of the Statute of Frauds: and by Parke, B., and Alderson, B., that it was a question of fact for the jury, whether, under the above circumstances, the purser held the mine and machinery in trust to employ the machinery in working the mine and making a profit of it for the benefit of the co-adventurers, who were to share the profits only, in which case the shares might be bargained for and transferred by parol; or whether the mine in trust for himself and his co-adventurers, present and future, in proportion to their number of shares; and if so, there was a direct trust in the realty, and consequently neither a bargain for, nor a transfer of, a share in such a trust could be made without a note in writing.

*154] But, supposing this bond does confer upon the holder *an interest in the land within the meaning of the Statute of Frauds, the question is, whether there was not a complete acceptance of the defendant's offer. By the advertisement, the plaintiffs offer the bond for 220*l*. The defendant proposes to give 210*l*., the purchase to be completed of course within a reasonable time. The plaintiffs agree to accept the 210*l*., but propose that the contract shall be completed *within a week*, and they wrote down on the letter containing the

defendant's offer, in the defendant's presence, these words, "to be completed in a week." No time having been specifically agreed upon, it would be understood that the time for completion would be such reasonable time as the law would imply; and the question is whether that is not satisfied by a week. It is merely defining what the law has already settled to be a reasonable time.

JERVIS, C. J.—The plaintiffs asked 220*l.* for the bond: that was refused. The defendant then offered 210*l.*, saying nothing as to the time for completing the contract: that was not accepted by the plaintiffs. Then the plaintiffs asked 210*l.* with a condition that the purchase should be completed in a week: to this the defendant refused to accede. You can only have a rule on the first point.

A rule nisi having been granted accordingly,

Montagu Chambers and *Lush* now showed cause.—The question is, whether a contract for the sale of one of these Westminster Improvement bonds, is a contract for the sale of an interest in or concerning lands, within the 4th section of the Statute of Frauds. The instrument itself clearly confers upon the obligee an interest in land, either legally or equitably. The last proviso in the condition refers to the mortgage mentioned in the 75th section of the 16 & 17 Vict. c. clxxvi., as having been *executed by the commissioners pursuant to the 18th section of the 18 & 14 Vict. c. cii. Now, the 18th section [*155 enacts "that it shall be lawful for the said Westminster Improvement Commissioners to secure the repayment of any sum or sums of money which they now owe, or may hereafter borrow, and the interest thereof, by mortgage of all or any part or parts of the lands, hereditaments, or funds acquired or to be acquired by them by virtue of the said acts of 1845 and 1847, and this act, or any of them, and to convey the lands or hereditaments intended to be mortgaged, and the fee-simple and inheritance thereof, to the persons to whom such sum or sums may be due, or who may hereafter lend the same, as the case may be, or to a trustee for them, as a security for the sum or sums so due or lent, as the case may be, and the interest thereof; and every such mortgage may contain such covenants by the said commissioners, and such other provisions as may be respectively agreed upon, for the payment of the sum intended to be secured by any such mortgage, by instalments or otherwise, and the interest thereof, and for reducing the rate of interest reserved on payment thereof within such period after the time appointed for payment as may be in that behalf agreed upon; and also a power of sale, upon such terms as may be agreed upon, of the lands, hereditaments, or funds comprised in such mortgage, or any part or parts thereof, absolutely, free from all equity of redemption; and also such other provisions as may be agreed upon." Thus, there is a general mortgage in favour of all the bond-holders, placing each even in a better position than that of an equitable mortgagee. [MAULE, J.—The deed would

enure as a legal mortgage as between the commissioners and the original bond-holders. We have not the mortgage deed before us. It may be that it confers on the cestui que trusts no interest in the land.

*156] It may amount to no more than a *charge on the land, like a judgment or a warrant of attorney under the 1 & 2 Vict. c. 110, s. 14.] It is impossible to read the proviso in the bond without seeing that it is something more than a charge upon the land,—a conveyance of the land itself. Besides, the thing which the plaintiffs by their advertisement profess to sell is a thing the debt mentioned wherein is “secured upon freehold property.” [MAULE, J.—That is not very material.]

Byles, Serjt., and *Day*, in support of the rule.—But for the last proviso, this clearly is nothing more than a common money bond. A contract is not within the 4th section of the Statute of Frauds, because incidentally it may carry with it a real security. Take the case of a judgment, a warrant of attorney, a simple contract, or any other chose in action,—all these may be assigned (equitably) without writing, and yet all may ultimately become charges on land. A man who has an elegit already executed has an interest in land. [MAULE, J.—No doubt.] Could he not assign it by parol? [MAULE, J.—No.] The question is, whether the plaintiffs might not have satisfied this contract without conveying to the purchaser an interest in land. [MAULE, J.—Do you admit, that, by virtue of the mortgage executed by the commissioners in pursuance of the 18th section of the 13 & 14 Vict. c. cii., the obligee had an interest in the land?] That must be admitted. [MAULE, J.—He sells it, and another buys it: does he not contract for the sale of an interest in land?] Not necessarily. The “benefit of the indenture of mortgage” may be satisfied by the personal covenants or provisos therein. The principal object of the contract was, the purchase of the bond, without reference to any real security. In *Donellan v. Read*, 3 B. & Ad. 899 (E. C. L. R. vol. 28), a landlord who had demised premises for a term of years at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant *undertaking to pay him an increased rent of 5*l.* a year *157] during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work: and it was held, that the landlord, having done the work, might recover arrears of the 5*l.* a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for an interest in or concerning lands within the Statute of Frauds. *Littledale*, J., in giving judgment, says,—“The most favourable words for the defendant are, that it is a contract for an ‘interest in or concerning land.’ But no additional interest in the land is given to the defendant by this contract; for, his interest is the same as before; it is only that there are bricks and other materials removed from the

house, and some others substituted in their room." The courts will always separate the principal object the parties have in view from that which is merely accessory; as in the case of a mortgage given as collateral security for a loan upon a note or bill,—*Doe d. Haughton v. King*, 11 M. & W. 338.† It is upon this principle that the contract of a factor who acts under a *del credere* commission is held not to be a contract to answer for the debt, default, or miscarriage of another, within the 4th section of the Statute of Frauds: *Couturier v. Hastie*, 8 Exch. 40.† In giving the judgment of the court there, Parke, B., after disposing of some of the points, says,—“The only remaining point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a per-centage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them: but, being the agents to negotiate the sale, the commission is *paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and, though it may terminate in a liability to pay the debt of another, that is not the *immediate* object for which the consideration is given: and the case resembles in this respect those of *Williams v. Leper*, 3 Burr, 1806, and *Castling v. Aubert*, 2 East, 325. We entirely adopt the reasoning of an American Judge (Mr. Justice Cowen), in a very able judgment on this very point, in *Wolff v. Koppel*, 5 Hill, N. Y. Rep. (American) 458.” [CRESSWELL, J. —That was an action for a breach of the defendant's duty as broker, not for non-performance of a contract.] In *Watson v. Spratley*, 10 Exch. 222,† it was held that an agreement for the sale of shares in a mining company managed on the cost-book principle, is not a contract for the sale of an interest in or concerning land. Alderson, B., says: “The principle is perfectly clear. If each shareholder in the mine has a joint interest in the land itself, that interest cannot pass except by the mode prescribed by the 4th section of the Statute of Frauds. But if, on the other hand, each shareholder has merely a right to a divisible proportion of the profits of the adventure, and no interest in the land, then the case is not within that enactment. This principle was well considered in the judgment of this court in *Bligh v. Brent*, 2 Y. & C. 294.† There it was pointed out, that, where the land is vested in the shareholders, and the corporation has only the management of it, as in the case of the New River Company,—*Townsend v. Ash*, 3 Atk. 326,—each individual shareholder has a definite portion of the land, for

*159] which he could maintain *ejectment; but, where, as in the case of *Bligh v. Brent*, the joint-stock money is intrusted to a corporation, who have the management of it, and the surplus profits alone are divisible among the individual corporators, there the land is only the instrument whereby the joint-stock money is made to produce a profit." In the present case, it does not appear what kind of a mortgage this is. [MAULE, J.—The 18th section of the 13 & 14 Vict. c. cii., shows that it is a conveyance of the fee-simple to the trustee.]

MAULE, J.—There can be no doubt whatever that the contract in this case was a contract for the sale of an interest in or concerning land, within the meaning of the 4th section of the Statute of Frauds. The commissioners are empowered by the 18th section of the 13 & 14 Vict. c. cii., "to secure the repayment of any sum or sums of money which they now owe, or may hereafter borrow, and the interest thereof, by mortgage of all or any part or parts of the lands, hereditaments, or funds acquired or to be acquired by them by virtue of the two former acts of 1845 and 1847, and this act, or any of them, and the fee-simple and inheritance thereof, to the persons to whom such sum or sums may be due, or who may hereafter lend the same, as the case may be, or to a trustee for them, as a security for the sum or sums so due or lent, as the case may be, and the interest thereof." And the section goes on to provide what covenants and provisions the deed shall contain,—amongst others, "a power of sale, upon such terms as may be agreed upon, of the lands, hereditaments, or funds comprised in such mortgage, or any part or parts thereof, absolutely, free from all equity of redemption," &c. That is the power which the commissioners have in that respect. By the 75th section of the 16 & 17 Vict. c. clxxvi., it is recited, that, *160] "pursuant to a power in that behalf contained in 'The Westminster Improvement Act, 1850,' the commissioners have executed an indenture, dated the 26th of May, 1852, for securing the performance of the condition of bonds granted pursuant to a certain deed of settlement of even date therewith, and therein referred to;" and that "the said indenture of mortgage affords an *improved security* to persons lending money to the commissioners." That being so, the plaintiffs contract to sell to the defendant a bond granted by the commissioners in the form prescribed by the last-mentioned act, the condition of which contains, amongst others, the following proviso,— "Provided that the above-written bond is granted by the said commissioners, to the intent that it may be entitled to the benefit of an indenture of mortgage dated the 26th of May, 1852, executed by the said commissioners, under the authority of the above-mentioned acts, and may be subject to the powers and provisions of an indenture of settlement of the same date, referred to in the said indenture of mortgage." The obligee under such a bond stands in the position of a mortgagee, either directly or through the trustee; and in either case

he has an interest in the land. When he agrees to sell his bond, he agrees to sell all his rights and remedies upon and incident thereto: the seller intends to sell, and the buyer to buy, the whole benefit of that bond. A part of that benefit is, the security of the land upon which it is charged. I cannot entertain the smallest doubt that this is a contract for the sale of an interest in land. It is suggested that the words "indenture of mortgage" may be satisfied by some security short of a conveyance of an interest in land. But, according to the 18th section of the 13 & 14 Vict. c. cii., the mortgage referred to here must be a conveyance of the freehold interest in the land. That is the ordinary meaning of the term mortgage, and that I think is the sense we must give to it here. *Watson v. *Spratley* clearly is no authority to show that this is not a contract for an interest in land: [*161 all that it shows, is, that another section of the Statute of Frauds has received a construction which would strike one as being contrary to the natural meaning of the words used. The plaintiffs here agree to sell the defendant a debt secured by bond. Looking at the bond, we find it is secured by a mortgage of certain land. No doubt, all the rights secured by the bond and the mortgage were intended to pass by the sale. It was clearly, therefore, a contract for the sale of an interest in or concerning land, within the 4th section of the Statute of Frauds. The rule must therefore be discharged.

CRESSWELL, J.—I am entirely of the same opinion. By the sale of the bond, the plaintiffs intended to part with the debt and all their security for the debt. The bond is granted under the statute 16 & 17 Vict. c. clxxvi., and in the form given in the schedule thereto. It cannot be doubted that the condition intended to give the obligee the full benefit of the mortgage which the 75th section recites to have been executed by the commissioners pursuant to the power vested in them by the 18th section of the preceding act, 13 & 14 Vict. c. cii. The holder of the bond, therefore, has clearly an interest in that mortgage. It seems to me to be quite plain that the case falls within the 4th section of the Statute of Frauds.

WILLIAMS, J.—I am of the same opinion. The bond would be utterly worthless, unless the benefit of the mortgage was conveyed along with it. The contract was clearly a contract for the sale of an interest in land.

JERVIS, C. J., concurred.

Rule discharged.

*162] *EBENEZER DAVIES v. DANIEL PRATT. *May 1.*

The court refused to send back an award to be amended (there being an error in the Christian name of one of the parties), in the absence of a motion to impeach the award.

AN arbitrator to whom this cause was referred having in making his award by mistake called the defendant David instead of Daniel, which was his true name,

Willes moved, on the part of the defendant, to refer it back to the arbitrator to amend it. [MAULE, J.—How can we do this except on a motion to set aside the award on that ground?] The plaintiff has given notice that he means to dispute the validity of the award; and this is the only defect that is apparent on the face of it. The defendant, therefore, wishes to have the matter set right before moving to enforce the award.

MAULE, J.—The plaintiff has obtained no rule to set aside the award. We cannot tell that he will dispute the payment of the costs awarded against him, if you demand them. Your application, therefore, is premature.

Motion withdrawn.(a)

(a) Vide post, Trinity Term.

*163] *SANQUER v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY. *May 1.*

The plaintiff, a provision merchant at Morlaix, sent 314 casks of butter by the defendants' railway, marked A., and addressed "to order, at Brewer's Quay." The defendants, concluding, from the fact of their having been in the habit of carrying butters similarly marked consigned to Messrs. A. & A., factors, in London, that these butters were intended for them, and having received directions from A. & A. to send all butters coming to them from Morlaix to Hibernia Wharf, delivered 154 of the casks at that place,—the remaining 160 having by accident got to Brewer's Quay.

C. & Co., the holders of the bill of lading, had received directions not to let A. & A. have the butters unless they accepted certain drafts at sight, which they declined to do; and, when C. & Co., applied to the defendants for information as to the 154 casks, they referred them to A. & A., and took no further notice of the transaction.

A. & A. afterwards sold the butters at the fair market price of the day, and rendered account-sales to the plaintiff; but, before the money was handed over, they suspended payment:—Held, that the defendants were liable to the plaintiff for this mis-delivery, notwithstanding he had so far adopted the acts of A. & A. as to endeavour to obtain from them the proceeds of the sale; and that the proper measure of damages, was, the net amount for which the butters had been sold.

THIS was an action brought by the plaintiff, a provision-merchant at Morlaix, in France, against the London and South-Western Railway Company, to recover the value of certain casks of butter received by them to be carried for him from Southampton to London, and through the negligence of their servants misdelivered, and thereby lost to the plaintiff.

The first count of the declaration stated, that, the defendants being

common carriers of goods for hire, the plaintiff delivered to them, and they received, his goods, that is to say, three hundred and fourteen casks of butter, to be taken care of and safely and securely carried by the defendants, as such carriers, from Southampton to Brewer's Quay, London, and to be there safely and securely delivered and left for the plaintiff, for hire and reward payable by the plaintiff to the defendants; that, although the time for so doing had elapsed before this suit, the defendants did not take care of and safely and securely carry and deliver the said goods as aforesaid; that, by and through the carelessness, negligence, and default of the defendants, a great part thereof, that is to say, one hundred and fifty-four *of the said casks of butter, became and were and are wholly lost to the plaintiff; and [*164 that thereby the plaintiff also lost the profits which he would otherwise have obtained from the sale of such portion of the said goods, and had also incurred expenses in seeking for and making inquiries concerning them, and in endeavouring to regain possession of them, and the hire paid by the plaintiff for their carriage had become lost.

There was a second count charging that the defendants converted to their own use, and wrongfully deprived the plaintiff of the use and possession of his goods, that is to say, one hundred and fifty-four casks of butter. And the plaintiff claimed 300*l*.

The defendants pleaded,—first, not guilty,—secondly, to the second count, that the goods were not the goods of the plaintiff, as alleged.

The following plea was afterwards added under the authority of a judge's order:—

“And for a further plea the defendants say that they, the defendants, delivered the said goods to certain persons carrying on business under the firm and style of Messrs. Allen & Anderson, with the assent of the plaintiff, and the plaintiff accepted such delivery in performance and satisfaction of the defendants' engagement and duty in that behalf, and of the defendants' liability in respect thereof.”

Upon each of these pleas the plaintiff joined issue.

The cause was tried before Jervis, C. J., at the sittings in London after the last term. The facts which appeared in evidence were as follows:—

The plaintiff, a provision merchant at Morlaix, had been in the habit of making consignments of butter to Allen & Anderson, sometimes as purchasers, sometimes for sale on his account. These consignments were usually forwarded to Southampton, and thence to London by the London and South-Western Railway; and the *usual mark or brand on the casks, when intended for Allen & Anderson, was the [*165 letter A. On the arrival of the goods at the terminus in London, the railway company caused them to be delivered by their own carriers at a bonded warehouse selected by the consignees.

A correspondence took place between the plaintiff and Allen & Anderson. VOL. XVI.—17

son, prior to the shipment of the butters in question, of which the following are extracts:—

August 25th, 1854, Allen & Anderson to plaintiff:—

“We have received your letter of the 21st instant, accepting our offer of 62s. for the 500 firkins of butter. They are arrived; but the quality is not so good as your neighbours’. We will take 500 more at 60s. on board: but they must be of the first quality.”

September 2d, 1854, plaintiff to Allen & Anderson:—

“It is impossible to do anything in butter at your limit of 60s. Very little comes to market; and this keeps the price firm. As the Enchantress was here, rather than let her go empty, I have resolved to do 244 barrels for you; and you will find enclosed the bill of lading and invoice at 62s. per 50 kilos, amounting to 388*l.* 5s., for which I have drawn upon you at sight, in favour of Ecuyer & Co.”

September 5th, 1854, Allen & Anderson to plaintiff:—

“We have received your letter of the 2d instant, with invoice for 244 barrels, at 62s.; but it is not possible to accept them. Our order was at 60s.; and you have not deducted the shillings upon the last invoice. Neither can we accept your bill for 388*l.* 5s. If you like, we will sell the butter for your account, and send you a bank-post bill for the amount.”

September 5, 1854, plaintiff to Allen & Anderson:—

“I confirm mine of the 2d, which advised shipment of 244 barrels of butter by the Enchantress, at 62s. *There is nothing to be
*166] done under: our market has risen again to-day; and at 62s. there is no profit; we ought to get 63s. now. Still, my wish to continue to do business with you has led me to offer you 300 barrels of butter, invoiced at the same price, and on the same conditions as the 244 barrels per Enchantress. Reply at once if you take them.”

September 7th, 1854, plaintiff to Allen & Anderson:—

“I confirm my letter of the 5th instant. Our market continuing to rise leads me to imagine that you will accept the 300 barrels which I offered you in the above letter. I have therefore decided to ship 314 barrels best butter to your address per Hamburg, and enclose you herewith invoice, at the price of 62s., amounting to 492*l.* 6s. 2*d.*, which I draw against my bill at sight in favour of Goodchaux & Co. At the rate we pay for butter now, we ought to get 63s., to leave a profit. So I think you will be pleased with my two shipments: but if, contrary to my expectations, you could not take the 558 barrels at 62s., please to take up my bills, and sell the goods for my account.”

September 9th, 1854, Allen & Anderson to plaintiff:—

“We have received your letters of the 5th and 7th instant. We cannot accept the 314 barrels at 62s.; and it is not possible for us to accept your bills at sight: it is not the custom here. All these butters are sold at two months’ date; and, in future, we cannot accept any

bills at less than thirty days. We will sell these 558 barrels for your account, and we will send you a bank-post bill for the amount."

September 9th, 1854, plaintiff to Allen & Anderson:—

"I am surprised that you do not accept my butter at 62s., since no one can sell now under 63s. Nothing has been shipped by the Enchantress, and very little by the Hamburg; so I expect you will have made up your mind to take my 558 barrels at my price of 62s., and that, if *you should not take them for your own account, I hope, if you sell them on mine, you will render me an account which will leave [167 the same price at least."

The 314 casks of butter mentioned in the plaintiff's letter to Allen & Anderson of the 7th of September, arrived at Southampton on the 9th, consigned to "order," and were on the same day forwarded to London, addressed to Brewer's Quay; but, in consequence of their having some time before received an intimation from Allen & Anderson that all butters received for them from Morlaix viâ Southampton might be forwarded to Hibernia Wharf, the defendant's servants, conceiving from the mark that these butters were intended for Allen & Anderson, caused 154 casks to be delivered at Hibernia Wharf,—the remainder having already been delivered at Brewer's Quay.

Finding that Allen & Anderson declined to accept his drafts, the plaintiff sent the bill of lading and invoice of the 314 casks per the Hamburg to Messrs. Goodchaux & Co., his agents in London. Accordingly, Messrs. Goodchaux & Co., on the 18th of September, addressed the defendants as follows:—

"We have bill of lading for 314 casks butter marked A. ⁸⁴⁵ ~~715~~, per Hamburg's last journey, and find that only 160 are arrived at Brewer's Quay. Could you explain us the fact?"

To this Goodchaux & Co., on the 18th, received the following reply:

"Referring to your favour of the 13th instant, relative to the 314 firkins, A., per Hamburg, à Morlaix, viâ Soton, 9th instant,—160 firkins of that consignment were delivered to Brewer's Quay, and 154 to Hibernia Wharf. Thinking some error had been committed by our friends, instructions were given to our carman to call en route to Hibernia Wharf, and ascertain if the butters were intended for them, they having always had *all the butters of this mark from Morlaix; and, upon their representation, they were delivered to order of Allen [168 & Anderson, who stated to my collector that they are prepared to render an account of sales when called on."

On the 19th of September, 1854, Goodchaux & Co. wrote to Allen & Anderson, as follows:—

"Mr. Cooper, of the London and South-Western Railway, informs us, that, out of the 314 firkins of butter ex Hamburg, which bill of lading we hold on behalf of Mr. Sanquer, 154 have been delivered to you, instead of being delivered for us at Brewer's Quay. We then beg of

you to send us the account sales, subject to the approval of the shipper, as we had no orders to dispose of these goods for the present."

To this Allen & Anderson replied on the 20th:—

"We have received 154 firkins of Charles Sanquer's butter out of a lot of 314, and which we have orders to sell for his account. They are not yet disposed of; but, when sold, we shall be quite ready to hand over the proceeds to M. Sanquer's order."

On the 22d of September, Goodchaux & Co. wrote to the plaintiff:—

"Of your 314 casks, Messrs. Allen & Anderson have received from the railway, we know not why, 154, as you will perceive from the accompanying letter. You will have to settle about them with that firm."

On the 22d of September, Allen & Anderson wrote to the plaintiff, advising sales of 85 firkins at 74s.; and on the 25th, the plaintiff wrote to them as follows:—

"In my letter of the 7th, I told you, that, if you could not take my 558 barrels on your own account at the price of 62s., I begged you to honour my draft, and to sell the goods for my account. Having learnt *169] that you had declined to honour my two bills of 383*l.* 5s., in *favour of Ecuyer & Co., and 492*l.* 6s. 2*d.* in favour of Goodchaux & Co., I then ordered the holders of the above-mentioned bills and of the bills of lading, to sell my 558 barrels of butter for my account. So I do not understand how you can say you have any butter of mine."

On the 25th, the plaintiff wrote to Goodchaux & Co. as follows:—

"I confirm my letter of the 23d, crossed with yours of the 22d, just to hand, and of which the contents surprise me in the highest degree. I have not given any orders to Messrs. Allen & Anderson to sell any part of the 314 casks, of which you hold the bill of lading; and I cannot at all understand the delivery of the 154 casks. Please, therefore, settle this business with Messrs. Allen & Anderson, or with the person who has delivered the 154 casks, and send me the account of the 314 casks at the earliest; for, there must be no delay in the sale, for fear the quality may deteriorate. You have already had the bill of lading a long time. I have just received from Allen & Anderson a letter which does not mention the 154 barrels. They merely tell me they are selling at 74s."

On the 29th of September, Allen & Anderson wrote to the plaintiff, advising him of the sale of the 154 barrels. On the 8th of October, the plaintiff wrote to them as follows:—

"I am in possession of your letters of the 22d and 29th ult. (advising sales), and now beg again, in conformity with what I wrote on the 29th ult., to pay to Messrs. Kraentsely & Méville the amount of my bill 383*l.* 5s., and to settle with Goodchaux & Co., for what you owe them for the 154 barrels which you received, as I have debited these two

houses with the amount of the bills upon you, which I remitted to them."

*On the 28th of September, Goodchaux & Co. wrote to the plaintiff, as follows:—

"Allen & Anderson, whom we have seen this morning, have informed us of the sale of A. 154 firkins, which have been delivered to them. They will remit you the amount and the account-sales direct. They have shown us a letter from you, in virtue of which they have acted. You gave them orders to sell at the best price, for your account, this lot, and another despatched to the same account."

In answer to this, the plaintiff, on the 8th of October, wrote to Goodchaux & Co., as follows:—

"As to what you tell me respecting Messrs. Allen & Anderson, it is very true, that, by my letter of the 27th ult., I told them, that, if they could not accept my 558 casks at my invoice price, they had only to pay my drafts and sell the goods for my account; seeing that, according to all commercial law and usage, I supposed they could not have received the goods without holding the bills of lading in their possession. Since it is otherwise, I recommend you to claim from Allen & Anderson the amount of the butters which they have received, that I may settle with you, the sole holder of the bills of lading, for the net proceeds of the 314 casks."

Allen & Anderson stopped payment on the 6th of October, 1854. The freight and charges on the 314 casks of butter were paid by Goodchaux & Co., who, after the failure of Allen & Anderson, as agents for the plaintiff, applied to the defendants for 271*l.* 11*s.* 2*d.*, the amount for which the 154 casks had been sold by Allen & Anderson.

On the part of the defendants, it was insisted, that, under the above circumstances, the defendants were justified in delivering the 154 casks in the manner they had done; and, if not, that the conduct of the plaintiff, *as evidenced by the correspondence between himself and Goodchaux & Co., his agents, and Allen and Anderson, both prior and subsequent to the delivery of the butters at Brewer's Quay, amounted to a ratification of such delivery as a delivery pursuant to the original orders.

The Lord Chief Justice commenced his summing up by telling the jury that the defendants had been guilty of a clear breach of duty in delivering to Allen & Anderson at Hibernia Wharf goods which had come to their hands upon a contract to deliver them to order at Brewer's Quay; for, that, although, where goods are addressed to "A. B., No. 10, Northampton Street," and A. B. has removed to No. 11, inasmuch as the essence of the direction is "A. B.," a delivery to him at No. 11 will satisfy the contract; yet that, where there is a contract to deliver goods marked A. "to order, at Brewer's Quay," the essence of the direction is "Brewer's Quay," and a delivery elsewhere will not

be a right delivery: and, consequently, that the only question for them to consider, was, whether the delivery to Allen & Anderson of the 154 barrels had been accepted by the plaintiff in satisfaction of the right delivery.

After some discussion, it was ultimately arranged, with the consent of all parties, that a verdict should be taken for the plaintiff for 258*l.* 14*s.* 6*d.*, the value of the butters, less the charges; with liberty to the defendants to move to enter a verdict for them, and to frame a plea in such a way as the court should think necessary, if they should be of opinion that the correspondence disclosed a defence,—the court to have the same discretion as to amending as the judge at nisi prius.

A verdict was thereupon entered for the plaintiff, damages 258*l.* 14*s.* 6*d.*

*172] *Bovill*, in Hilary Term last, pursuant to the leave *reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants.

Byles, Serjt., *Lush* and *Quain*, showed cause.—The facts are shortly these:—Early in September last, the plaintiff shipped 314 casks of butter for Southampton, from Morlaix, marked A., and addressed “to order, at Brewer’s Quay, London,” to be conveyed thither from Southampton by the defendants’ railway; the bill of lading and invoice being sent to Goodchaux & Co., with instructions to let Allen & Anderson have the goods upon their accepting the plaintiff’s draft at sight, but otherwise to sell them themselves for the shipper’s account. The defendants delivered 154 of these casks to Allen & Anderson at Hibernia Wharf, and now seek to excuse themselves on the ground that Allen & Anderson had given them directions to deliver there all butters which came from Morlaix for them. Allen & Anderson received the 154 casks, but declined to accept the bill. They afterwards sold the butters, but, before the proceeds were paid over to the plaintiff or his agents, they suspended payment. There is nothing in the correspondence to warrant the notion of an acceptance or ratification by the plaintiff of the delivery at Hibernia Wharf as a delivery in pursuance of the contract; or in any way to sanction Allen & Anderson’s dealing with the butters. The defendants were guilty of a clear breach of duty in delivering these 154 casks at Hibernia Wharf. [MAULE, J.—As soon as the goods were delivered at the wrong place, the consignor had a right of action against the carriers. Can the company be permitted to say,—“True, we made a wrong delivery of your goods, but, after you knew of that wrong delivery, you accepted it in satisfaction of your right of action?”] Clearly not. Without an allegation of prior license, the plea is worthless: and there is no evidence whatever of
 *173] license. The *whole correspondence shows the most scrupulous anxiety on the part of the plaintiff to avoid employing or intrusting Allen & Anderson either as factors or as vendees of the butters

on credit. Goodchaux & Co. were not authorized to employ them to sell, nor is there the slightest evidence that they did so.

Bovill, in support of the rule.—The letter of the 5th of September, 1854, which opens the correspondence with reference to the shipment in question, shows for what purpose the butters were sent. In that letter the plaintiff offers to send Allen & Anderson “300 barrels of butter invoiced at the same price, and on the same conditions, as the 244 barrels per *Enchantress*,” and on the 7th, he again writes to them as follows:—“I confirm my letter of the 5th. Our market continuing to rise leads me to imagine that you will accept the 300 barrels which I offered you in the above letter. I have therefore decided to ship 314 barrels best butter to *your address*, per *Hamburg*, and enclose you herewith invoice at the price of 62s., amounting to 492l. 6s. 2d., which I draw against by bill at sight in favour of Goodchaux & Co. If, contrary to my expectations, you could not take the 558 barrels at 62s., please to take up my bill, and sell the goods for my account.” The same expressions are repeated in the plaintiff’s letter of the 9th. Then Allen & Anderson write on the 9th, declining to accept the 314 barrels at the price offered, or to pay the draft, and adding,—“We will sell these 558 barrels for your account, and we will send you a bank-post bill for the amount.” On the 16th, the plaintiff writes again to Allen & Anderson, and, though he acknowledges the receipt of their letter of the 9th, there is not a word of dissent to their selling the butters on his account. Again on the 28d he writes, but still no dissent. [MAULE, J.—If he had meant to assent, he would have *directed Goodchaux & Co. to deliver the bills of lading to Allen & Anderson. It is quite clear he did not mean to trust them.] [*174] The company were induced by the plaintiff’s acts to believe that the butters in question were intended for Allen & Anderson. Assuming that the 154 casks improperly got to the possession of Allen & Anderson, no complaint was ever made of the alleged wrongful delivery until after their failure. [MAULE, J.—The plaintiff does not complain until he finds he has sustained an injury by the misdelivery.] If the butters had got to the hands of Goodchaux & Co.; and they had employed Allen & Anderson to sell them for the plaintiff’s account, could the latter have maintained an action against the company for the original misdelivery? When told, on the 18th of September, that a portion of the 314 casks per *Hamburg* had been delivered to Allen & Anderson, Goodchaux & Co. make no objection; but, on the contrary, proceed to treat with Allen & Anderson as if they were holding them for them; they deal with the goods as the plaintiff’s goods in Allen & Anderson’s hands. At the most, this can only be a case for nominal damages, and the court will not hold themselves precluded by the form of the rule from doing justice between these parties by reducing the damages or sending the case down to a new trial.

MAULE, J.—I am of opinion that this rule should be discharged. The rule in terms asks that the verdict found for the plaintiff at the trial be set aside, and instead thereof a verdict be entered for the defendants,—neither more nor less. That is a rule which it would not be competent to the court to grant, unless leave for that purpose were reserved, and with the consent of all parties. The consent here is, that there shall be a verdict entered for the plaintiff for 258*l.* 14*s.* 6*d.*, *175] and that that verdict shall stand unless the court shall be of *opinion that a verdict ought to be entered for the defendants. I think we should be doing very wrong, if, under pretence of doing justice between the parties, we were to depart from the terms of that agreement. They may have had reasons of their own for making that agreement, which they do not choose to confide to any one else. It is a very peculiar jurisdiction only which can reform an agreement that has been entered into between parties who are competent to agree. It seems to me that we should be usurping a power with which we are not intrusted, if we were to do that which we are now asked to do. If we think the plaintiff has a right of action, whatever we may think about the amount of damages, is wholly irrelevant; that question has not been reserved for us. The only question before us, is, whether or not the plaintiff had a cause of action. The defendants received these goods upon a contract to deliver them to the shipper's order at Brewer's Quay. Instead of doing this, they chose to assume, that, because there had been former dealings in butters between this particular consignor and Allen & Anderson, and these butters were marked with the letter A., they were intended for that firm, and accordingly delivered a portion of them, viz. 154 casks, to Hibernia Wharf, for Allen & Anderson. The plaintiff had an undoubted right of action for the defendants' failure to deliver the butters at Brewer's Quay. There is no colour for saying that the defendants were authorized to deliver them anywhere else, or to Allen & Anderson. It is said that the plaintiff did not complain as soon as he might and ought to have complained. He trusted, no doubt, no loss would result to him from the defendants' breach of duty. It, however, turned out otherwise; and, as soon as a loss did arise, he brought his action. Even if the plaintiff, after he had become aware of the misdelivery of the goods, had ratified it, that would not *176] have *disposed of the cause of action once vested. Suppose the defendants had dropped the goods half way, and they had afterwards been delivered to the plaintiff in a damaged state,—he would still have his right of action, and might keep the goods. Having a right of action here, the plaintiff has sustained considerable damage, the third plea has not been proved, and the defendants have no defence. The rule must be discharged.

CRESSWELL, J.—I am of the same opinion. Beyond doubt there has been a wrong delivery, and the defendants are liable to the owner of

the goods. As to the amount of damages,—that is a difficult question to deal with but, if I had to consider that question in this case, looking at the correspondence, I should have no hesitation in saying that the sum at which the jury have assessed the plaintiff's compensation is not too large. It appears, the defendants had immediate notice that the butters had been wrongly delivered; in answer to which, they say they thought the consignor had made some blunder in addressing them to Brewer's Quay, and that they had sent them to Allen & Anderson; and they trouble themselves no further. So far from sanctioning what the defendants did, the plaintiff repudiates it from beginning to end. On the 19th of September, the plaintiff's agents, Goodchaux & Co., it is true, write to Allen & Anderson, and desire them to send them the account-sales of the butters, but subject (they add) to the approval of the shipper. At this time they supposed the butters had been sold. And on the 25th, writing to Allen & Anderson, the plaintiff says:—*"Having learnt that you had declined to honour my two bills, of 388l. 5s. in favour of Ecuyer & Co., and 492l. 6s. 2d. in favour of Goodchaux & Co., I then ordered the holders of the above-mentioned bills, and of the bills of lading, to sell my 558 barrels of butter (including the 154 barrels now *in question) for my account; so I do not understand* [*177 *how you can say you have any butter of mine."* That does not look much like acquiescence. I think the verdict is quite right, and the damages not too large.

WILLIAMS, J.—I am entirely of the same opinion. The plaintiff was clearly entitled to a verdict, and I think the jury have given the right measure of damages. The loss was the direct and immediate consequence of the non-delivery of the butters according to the defendants' contract. I think there is no evidence of any ratification by the plaintiff, or adoption, of the misdelivery. I cannot so regard the correspondence. That amounts only to this,—if the plaintiff could get the proceeds of his goods, he was content to receive them from Allen & Anderson. But, failing to obtain them from Allen & Anderson, he has recourse to the company.

JERVIS, C. J., concurred.

Rule discharged.

CROWTHER v. CROWTHER. April 21.

Costs of making a judge's order a rule of court.

THE following order having been made in this cause, by Maule, J., on the 18th instant,—

"I do order that the defendant shall within three days obtain the discharge of the plaintiff in the action in which she is detained at the suit of John Minton, by paying the amount of the debt for which she

is detained, and paying within the same time to the plaintiff's attorney the sum of 50*l.*, agreed costs of this action; *and shall also, *178] within fourteen days, take at his the defendant's expense whatever proceedings may be necessary to obtain the vacating of the vesting order in the court for the relief of insolvent debtors obtained by the said John Minton against the said plaintiff in this action; and that *thereupon* all proceedings in this cause shall be stayed,"—

Joyce moved to make the order a rule of court. The Master had objected to the rule being drawn up in the usual form, *with costs*, on the ground that the order was conditional in its terms. It was now submitted that the order was a positive order requiring the defendant absolutely to do two things, viz. obtain the plaintiff's discharge in the former action and pay certain costs, and obtain the vacating of the vesting order.

CRESSWELL, J.—The first two branches of the order are clearly mandatory on the defendant: the third is for the defendant's benefit when he has performed the other two.

PER CURIAM.—The rule may go.

Rule absolute.

*179] *MARTIN v. THE GREAT NORTHERN RAILWAY COMPANY. May 24.

In an action against a railway company for negligence in the management of their railway at one of their stations, whereby the plaintiff, a passenger, was injured,—the defence relied on by the defendants' counsel was, that the accident arose *entirely* from the plaintiff's own want of caution, and that the company were wholly blameless. The evidence showed that the plaintiff arrived at the station about two minutes or less before the time of departure of the train, and that, in running along the line, at a place where he ought not to have gone, in order to reach the train, which was some distance ahead on the opposite side of the railway, he fell over a switch-handle, and was considerably hurt. The judge left it to the jury to say whether the injury to the plaintiff was occasioned by the negligence and want of proper care of the defendants, or resulted *entirely* from the plaintiff's own carelessness, as the company contended. The jury having found for the plaintiff:—

Held, that the judge was, under the circumstances, warranted in leaving the case to the jury upon the only points raised by the parties; and that the omission to call their attention to the intermediate case of the negligence of both parties being contributory to the accident, was no misdirection.

Quære, whether the doctrine of contribution is applicable to a case of this sort,—of tort founded upon contract.

THIS was an action brought by the plaintiff to recover compensation in damages against the Great Northern Railway Company, for an injury sustained by the plaintiff in consequence of alleged negligence on the part of the company.

The declaration stated, that, before and at the time of the committing of the grievances thereafter mentioned, the Great Northern Railway Company were the owners and proprietors of a certain railway, to wit, the Great Northern Railway, and of certain railway stations upon

and adjoining to the said railway, to wit, at London and at Barnet, and of certain carriages used by them for the carriage and conveyance of passengers from a certain place, to wit, the said station at London, to a certain other place, to wit, the said station at Barnet, and from the said station at Barnet to the said station at London, for hire and reward to them the defendants in that behalf: that thereupon the plaintiff, at the request of the defendants, became and was a passenger on the said railway, to be carried and conveyed on the said railway by the defendants, for hire and reward to them the defendants in that behalf, from the *said station at London to the said station at Barnet, and back [*180 again from the said station at Barnet to the said station at London: that the plaintiff, having been duly carried and conveyed as such passenger as aforesaid by the defendants from the said station at London to the said station at Barnet, afterwards arrived at the said station at Barnet to be carried and conveyed by the defendants back again to the said station at London, as such passenger as aforesaid, by certain of the said carriages of the defendants which were then about to proceed from the said station at Barnet to the said station at London, and by which the plaintiff was then entitled, as such passenger as aforesaid, to be so carried and conveyed back as last aforesaid, and the said station at Barnet then being under the care, control, and management of the defendants: yet that the defendants so negligently managed the said station at Barnet, and so carelessly omitted to light the same in convenient and proper places, and in a sufficient manner for the use and convenience of passengers by the said railway, and the said carriages of the defendants lawfully using the said station at Barnet, during the night and hours of darkness, and to provide for the safe transit of passengers by the said railway from one side of the last-mentioned station to the other side of the same, that the plaintiff,—it being then night, and dark,—in consequence of the negligence and carelessness of the defendants as aforesaid, fell and was thrown down with great violence on the rails of the said railway in the last-mentioned station; whereby one of the arms of the plaintiff was greatly hurt, and the plaintiff became and was greatly bruised and wounded, and so continued for a long time, during all which time the plaintiff thereby suffered great pain, and was prevented from performing and transacting his lawful and necessary affairs by him to be performed and transacted, and was thereby hindered and *prevented from making great gains which he might [*181 and otherwise would have made and acquired; and the plaintiff was thereby put to and necessarily incurred great costs and expenses in and about endeavouring to be cured of the said hurts and wounds so occasioned as aforesaid: And the plaintiff claimed 500*l*.

The defendants pleaded not guilty.

The cause was tried before Maule, J., at the first sitting at Westminster in Easter Term last. The facts that appeared in evidence were

as follows:—The plaintiff had taken a return-ticket to go by the London and Great Northern Railway from London to Barnet, and back. He got safely to Barnet; but, wishing to return by the train which leaves Barnet a little before 7 o'clock in the evening, the plaintiff presented himself at the station just as the train was about to start. Being told that he was in time, he passed through the station. The Barnet station is so constructed that passengers wishing to go to a train on the "up line," must cross the "down line,"—for which purpose there is, at the end of the platform of the down line, an inclined plane of timber, at right angles with which is a planked crossing leading to the platform on the other side. When the plaintiff arrived, being in a hurry, and not observing the crossing, but seeing the red lamps of the train at some little distance up the line, he ran straight on, and, coming in contact with the handle of a "switch," he fell over it, and hurt himself considerably.

There was contradictory evidence as to the sufficiency of the light at the station,—the plaintiff's witnesses swearing that there was not light enough to enable a person unacquainted with the premises to move about with safety,—the defendants' witnesses, on the other hand, stating that there was ample light throughout the station, for all purposes.

*182] It was contended, on the part of the defendants, that *the injury* the plaintiff had sustained was *entirely* the result of *his* negligence and want of care, in going to a part of the railway where he had no business to go; and that, if he had gone over, as he ought to have done, by the proper crossing from the down to the up side of the line, the accident would not have occurred; and therefore that the defendants were not responsible.

It was, however conceded that there was no light at the spot where the switch-handle stood, and that there was no fence or rail to prevent persons walking down the inclined plane from proceeding onward to that spot.

The learned judge left the case to the jury with the following direction:—"The plaintiff in this action seeks to recover damages against the Great Northern Railway Company, for an accident which occurred to him, as he says, in consequence of their negligent management of their station at Barnet. It appears that the plaintiff had taken a return-ticket, by which he was entitled to return to London by the train that was to start a little before seven o'clock. He came to the station, but the carriages were a good way ahead of him, on the opposite side of the line. He wanted to go up the line, but was on the side of the down line, so that he had to cross to get to the carriages. They had red lamps at the back. The proper way to get across would have been over a wooden crossing at the end of the platform. The plaintiff, however, seeing the carriages a good way ahead of him, and not knowing of that wooden crossing,—there being nothing to point it out to

him, and nobody to tell him that he ought to cross there,—he, as it seems to me, naturally enough, went straight on by the side of the down line, intending, I suppose, to go on until he came opposite to the end of the train on the up line, and then to cross, not being aware of the special kind of crossing provided by that wooden crossing. In going along in that way, he came against a switch, the *handle of which turns a movable rail, and he was thrown down by that, [*183 and suffered in the way you have heard from himself and the surgeon who attended him. Now, he says in his declaration that that took place, not simply from the want of light, but from the careless and inefficient management of the station generally: *and you are to say whether this accident occurred to him in consequence of that negligence on the part of the company, or whether, as the company say, it was entirely the plaintiff's own negligence that produced this effect.*

“Now, of course, the plaintiff did not mean wilfully to inflict upon himself an injury of this kind. What he really meant to do, was, to get to the train in the most convenient and safe manner that he could. Accordingly, he goes straight on upon the same line, instead of turning to the left a good way short of the carriages he was going to, and as the company say he ought to have done. He says there was not sufficient light, *and also*, supposing there had been sufficient light, how was he to know under the circumstances that he ought to cross there, and that it was wrong to go straight on as he was going? There is no doubt, that, where he did fall down against the switch, there was no light which could make the switch visible. That appears not only by the evidence of the plaintiff, but also from the evidence given on behalf of the defendants. The witness Everard says the crossing could be seen, that there was quite sufficient light, such light as oil could give, but not like gas-light. The crossing, he said, could be seen, but not the point, that is, the point that the plaintiff fell against. So that there is no doubt that it was dark at the place where the point was. Then they say, on the part of the railway company, that the plaintiff ought not to have gone to that place, that he ought to have known better, and that, with the *opportunities, and the time, and the light that he had, he ought to have taken notice of the peculiarities of the place, so as to discover that the proper way to reach the train, was, by crossing over this wooden place. [*184

“There is some contradiction in the evidence about the light. The officers of the company say there was light enough. The opinion as to there being light enough is so vague, that many people may differ upon it. The plaintiff says there was not light enough. Now, the plaintiff and the defendants stand in very different circumstances. The company's servants are perfectly conversant with the station; that is the place where they live; that is where they are constantly on duty; they know every inch of the station. The plaintiff knows nothing

about it. He may have been there in the morning: he possibly may have been there once before in his life; but he is not conversant with the station. Now, a much less degree of light will enable a person who is waiting at a place with which he is familiar, to see all about him, and to understand where he is, than would be required to light a person who is waiting at a place of which he has no knowledge. Take the case of a large warehouse,—which possibly some of you may have,—if you went into a warehouse with which you were familiar, you would see every staircase and turning, or any apparatus there might be about it, with the slightest possible light. But a person who has never been there before, and knows nothing about it, must have a great deal more light to enable him to see his way. The witnesses for the defendants may be quite sincere in saying there was plenty of light; and their evidence may be quite true, as far as they are concerned: but the question is, was there plenty of light for the plaintiff? Because they are *185] to light their railway, not for their own servants alone, but for *persons who have never been there before, and who are in a great hurry; and they are to light it so as to enable them to see their way.

“Now, then, certainly, with respect to the general management, there appears to be very strong evidence of negligence; but it is for you to say what your opinion is upon that. It strikes me, that, in several respects, it would be very advisable that this company should do what other companies do. The witness who stated that he had been station-master at Hornsey, said that people ought to be five minutes before their time. Now, cautious and careful people who have five minutes to spare will be five minutes before their time: but everybody who knows anything about railways, is aware, that, if you appoint a particular time for doing business, which a good many people do, very often you are obliged to put it off to the very last moment. Some years ago, it was provided that railway plans should be deposited at an office at Whitehall on or before a certain day. Now, the end of that day was twelve o'clock at night: and, at twelve o'clock there were scores of post-chaises and four arriving with surveyors who had plans to deposit which they had been obliged to put off to the very last moment. Anybody who knows anything of railway business, or indeed any other business, knows that very often what can be put off will be put off. Many people have so many things to do, that they are obliged to put off what they can. That that takes place with railways, no human being can doubt: yet this station-master does seem to believe that no such thing can happen as persons being in a hurry, and coming in at the very moment the train starts. Now, that that will constantly happen, no one can doubt, and that exposes people to great danger. Persons run very great risks, and rush into carriages, even when the train is in motion. That might be prevented by only shutting

*the door of the station as the train is about to start. Now, it seems to me that there was negligence on the part of the company in not doing that. There is another thing that might also have been done, I think. This plaintiff got the damage which he did in walking straight along on the same side of the railway on which he was properly to walk, according to the company; but, instead of turning short off to the left when he came to the crossing, he went straight on. What can be so natural as for a person to go straight along, when there is nothing to point out his direction, and nobody to tell him where he is to turn? If they choose to allow people to cross the line at the last moment, it seems to me they should have a person to point out to passengers who are in a hurry the right course for them to take, and to tell them 'You must turn here,' or 'You must turn there,' or 'You must go across the railway here.' Or, if they do not have a man, they might have a board placed at the end of the platform, with 'To the train,' in large letters painted upon it, and a hand upon that board pointing to the direction which people are to take. If such a board as that is placed just where a crossing is, that would stop everybody, and warn them not to go there. [*186

"Now, here, what they have done, is, to allow people to come two minutes, or less, before the time the train starts, and, with such light as they give, leave them to find out for themselves what it is they are to do, and to find that out with the extreme rapidity and anxiety of mind incident to persons who are afraid of being too late for a train. I own that seems to me to be very different indeed from what ought to be reasonably and diligently taking care of the public safety. As I said before, that is for you to consider. If you think there was not any deficiency of care on their part, then they are not guilty in that respect of any negligence: but I *own it looks to me very like [*187 that. I am afraid there is no doubt that a great many of these accidents arise out of a sort of extreme economy, and the desire of saving money in very small matters, such as gas, or oil, or the wages of a single servant at a station. But, here, I must own that it appears to me such a board as I have described would be advisable. You must yourselves have observed such a board at the London Bridge station; and I myself have found it very useful when I have been in a hurry to go by the train to Brighton, or wherever else I may have been going. I do not know what such a board would cost: perhaps 10s., or even less than that: but, if such a board had been there, it would have saved Mr. Martin from his knock on the elbow, and from the suffering which his doctor has described. However, that seems to me to be an ingredient for your consideration.

"Then, with respect to the quantity of light, I have already observed that the light was quite sufficient for the company and their servants for their own purposes: but it ought to be enough for everybody: and,

although it is true the man had no business, as they say, where this switch was; yet, if there had been any strong light on the switch, that would have indicated to the man that he had no business there, and would have prevented him from falling across that handle. Instead of leaving a person to infer from the want of light that he is not to go to a particular place, it seems to me that they ought to have indicated it in some other manner. *I do not lay that down, however, as a matter of law.*

"That is the estate of things in which this accident occurred. The plaintiff, when he was called, made no exaggeration as to his suffering; but said that he was unable to attend to his business for three weeks; and the medical man, who made the very moderate charge of two *188] guineas for his services, said he suffered very great pain, *not only in his elbow, but in his leg, and that his nerve was injured. Anybody who has had a moderate knock on the elbow knows by experience that it is an extremely painful and unpleasant thing. If you multiply that by the pain which must take place by a person falling down upon his elbow, you may well understand that Mr. Martin suffered a great deal. *If you think that the negligence of the defendants produced the effect which he complains of, then you will say so, and give him such damages as you think proper. If you think that his own negligence brought him pain, then he must suffer, and the company will not have to pay for it.*"

The jury returned a verdict for the plaintiff, damages 20l.

Watson, in Easter Term, obtained a rule nisi for a new trial, on the ground of misdirection, and also that the verdict was against evidence; and also to arrest the judgment, on the ground that the declaration disclosed no breach of duty on the part of the company. He referred to *Butterfield v. Forrester*, 11 East, 60, and *Davies v. Mann*, 10 M. & W. 546.†

H. Giffard (with whom was *Wilkins*, Serjt.) showed cause.—The direction of the learned judge to the jury was perfectly correct. [MAULE, J.—Substantially, I left it to the jury to say whether the accident happened through the negligence of the defendants, or through the plaintiff's own negligence. I told them that the company were bound to do what was needful for the safety of their passengers; and pointed out to them, that, where people are permitted to pass through the station so near the time of the departure of the train as to require them to proceed rapidly, more care was requisite to prevent them from getting into danger. It was for the jury to say whether sufficient had *189] been done *by the company in that respect,—whether the accident resulted from any want of what the jury thought the company should have done, or from negligence on the part of the plaintiff himself.] It clearly is not the duty of the judge to lay all the law before the jury. The learned judge here did put to the jury the points,

and the only points, which were suggested by the counsel on either side. It was never for a moment hinted that the plaintiff had *contributed* to the accident by *his* negligence. If the jury believed his evidence, there was clearly no negligence on his part. The defendants' mode of conducting business at the Barnet station seems to have been remarkably loose. Passengers were allowed to rush through to the train up to the very moment of its departure. There was some conflict of evidence as to the degree of light. All that was for the jury. The general rule of law respecting negligence, as laid down by the Court of Exchequer in *Davies v. Mann*, 10 M. & W. 546,† is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he is entitled to recover. It is said that the declaration here discloses no cause of action; for, that there is no statute or rule of law which compels railway companies to light any part of their railways: but the want of sufficient light was only one of the many ingredients which combined to constitute negligence on the part of the company. They are bound so to conduct themselves in all things as that the duty they contract to perform shall be performed in a reasonable and proper manner. They are bound to use all due precautions to prevent injury to passengers. As they carry passengers by night, they necessarily undertake, indirectly, so to light their stations as to render them convenient and free from danger.

* *Watson*, and *G. R. Clarke*, in support of the rule.—According to *Butterfield v. Forrester*, 11 East, 60, *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244,† and *Davies v. Mann*, 10 M. & W. 546,† it should have been left to the jury in this case to say,—first, whether there had been negligence on the part of the defendants,—next, whether, by using ordinary care, the plaintiff might have avoided the accident. In *Butterfield v. Forrester*, Lord Ellenborough says,—“Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.” That is supported by *Davies v. Mann*, where Parke, B., says: “The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*: and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong.” And that again is adopted in *Davies v. Mann*. It is a question for the jury, under the circumstances of each particular case. Here, the man was running where he must have known he had no business to go. The same rule applies in what are called running down cases: in *Vennall v. Garner*, 1 C. & M. 21,† Bayley, B., said: “I quite agree, that, if

the mischief be the result of the combined negligence of the two, they must both remain in statu quo, and neither party can recover against the other." Assuming that the light was insufficient here to enable the plaintiff to see where he was going, was not there an increased necessity for care and caution on his part? [MAULE, J.—You did not put it at all upon the ground of contribution. You did not admit that *191] the company was at all in fault. It might have been *dangerous to do so. The company contract with the plaintiff to take him from London to Barnet and back. That raises a duty in them to do all that may be necessary to perform that contract safely. Does the doctrine of contribution apply to such a state of things?] Coming late to the station, the plaintiff admitted that he was running so fast as not to be able to see where he was going. [MAULE, J.—Whose fault was it that he was running? You let him through the booking-office just as the train was on the point of starting, when, if he had proceeded at the pace he ought to have gone at, he must inevitably have been too late.] That does not justify the plaintiff in abandoning all discretion, and rushing heedlessly upon unknown dangers. [CRESSWELL, J.—Your difficulty is this:—You advisedly at the trial opened a case of perfect blamelessness on the part of the company, and gross and culpable negligence on the part of the plaintiff. You did not ask the learned judge to adopt the middle course which you now suggest. Can we, therefore, grant a new trial on the ground that it was not put to the jury?] This subordinate point is necessarily involved in the other. [JERVIS, C. J.—The motion for a new trial is given in lieu of a bill of exceptions. If there had been a bill of exceptions here, you must have pointed out this ground, and then it might have been put to the jury, and disposed of at once. Justice to all parties requires that it should be so.] It certainly is laid down generally in Archbold's Practice, 10th edit. 1823, that "the court will not grant a new trial for an objection, either to the direction of the judge at the trial, or to the admission or rejection of evidence, unless such objection was distinctly raised at the trial: but the authorities referred to,—the principal of which are, *Robinson v. Cook*, 6 Taunt. 336 (E. C. L. R. vol. 1), *Morrish v. Murrey*, 13 M. & W. 52,† 2 D. & L. 199, *Hardman v. Bellhouse*, 9 M. & W. 596,† *Hazeldine v. Grove*, *3 Q. B. 997 *192] (E. C. L. R. vol. 43), 3 Gale & D. 210, *Williams v. Wilcox*, 8 Ad. & E. 314 (E. C. L. R. vol. 35), 3 N. & P. 606, *Walker v. Needham*, 1 Dowl. N. S. 220, *Doe d. Gilbert v. Ross*, 7 M. & W. 102,† *Gibbs v. Pike*, 9 M. & W. 351,† 1 Dowl. N. S. 409, and *Goslin v. Corry*, 8 Scott, N. R. 21, 7 M. & G. 342,—do not bear it out. [CRESSWELL, J.—It certainly is too largely stated.]

At the close of the argument, *Clarke* admitted that the omission in the summing up had occurred to him whilst the learned judge was pro-

ceeding, and that he called the attention of Mr. *Watson* to it; but they judged it more prudent not to interpose.

JERVIS, C. J.—I am of opinion that this rule should be discharged. This is an action founded upon a contract. If the matter were well considered, it is not impossible that there might be found to exist a distinction between such an action and one founded simply on negligence. That point, however, was not made, and I forbear to express any opinion upon it. The counsel on both sides have treated it as an action for negligence; and, so taking it for the purposes of the day, I admit, and at once state, that, in my view of it, the plaintiff would not be entitled to recover, if his own negligence or want of care at all contributed to bring upon him the injury of which he complains. It is said that that view of the case was not presented to the jury. I take it for granted that it was not. But, looking to the course the cause took at *Nisi Prius*, I think it is not competent to the defendants now to object, that, in his summing up, my Brother Maule adopted the line taken by the counsel themselves. I do not wish to be understood as laying it down as a general rule, that a party is precluded from objecting that the judge has overlooked a point of law, because it was not made at the trial: I confine myself to the facts and circumstances of the *particular case. [*193 The right of the plaintiff to recover in this case involved three questions,—first, whether the accident was caused by the defendants' negligence (which, if properly explained, involves the third),—secondly, whether the plaintiff himself was wholly free from blame (if he was, there is an end of the matter),—thirdly, whether both parties were guilty of negligence. All these points should, properly speaking, have been left to the jury. But, by mutual consent, and with full knowledge on the part of the defendants' counsel of the point being open on the record, and essential to the maintenance of the action, Mr. *Watson* advisedly,—and, in my opinion, most prudently,—opened his case upon the high ground, that the defendants were altogether free from blame, and that the accident had happened *entirely* through the carelessness and clumsiness of the plaintiff himself. My Brother Maule sees the course thus taken by the defendants' counsel; the plaintiff's counsel sees it likewise: and all act upon it throughout. And my Brother Maule, in his direction to the jury, tells them,—“You are to say whether this accident occurred to the plaintiff in consequence of negligence on the part of the company, or whether, *as the company say*, it was *entirely the plaintiff's own negligence* that produced this effect,”—pointedly inviting the attention of the defendants' counsel to the view they themselves had presented. And Mr. *Clarke*, very candidly and properly admits that he was quite aware of this technical omission in the summing up; and says that he pointed it out to his learned leader. They, however, judged it prudent to keep quiet, and take their chance with the jury on the ground upon which they had launched their defence.

How can they, under these circumstances, now ask for a new trial? I put the case upon the ground of the acquiescence of the counsel in the *194] mode in which the case was left to the jury. It is *just as if my Brother Maule had asked them if they wished any other point to be left to the jury, and they had answered in the negative. On this ground, I am clearly of opinion that the rule ought to be discharged.

CRESSWELL, J.—Assuming, for the purpose of the argument, that, though the jury rightly found that the defendants had been guilty of negligence, yet, if it were established to the satisfaction of the jury that the plaintiff might by the exercise of reasonable care and caution have avoided the accident, the defendants would be entitled to a verdict; nevertheless, we ought not to grant a new trial on the ground that the point was not presented to the jury. At the trial, the plaintiff's counsel put the case entirely on the ground of negligence on the part of the defendants; and the defendants' counsel rested their defence upon a total denial of negligence on their part. They did this advisedly, and purposely abstained from suggesting that there had been negligence on both sides; well knowing, that, if they admitted a scintilla of negligence on the defendants' part, their chance of a verdict in their favour was utterly hopeless. Having deliberately and advisedly taken that course, I think we should be doing the grossest injustice to allow the verdict to be disturbed, merely because the learned judge in his summing up confined himself to the points made on the one side and on the other. This is very different from a case where counsel at the trial may themselves have overlooked the point in the cause,—the true construction of a deed, for instance. The judge in that case may be bound to know the law, and to supply any defect in that respect on the part of the counsel. But the judge is not bound to deal with every question of fact which the evidence may suggest, whether the counsel have thought proper to raise it or not. Having made their election as to *195] *the issues on which to rest their case, we must hold the parties bound by it. The case of the bill of exceptions put by my Lord Chief Justice shows that the defendants ought not now to be permitted to urge this point before us. If a bill of exceptions had been tendered here, the point would have been put to the jury, who would at once have disposed of it. The defendants should not, by lying by, and taking their chance of a verdict upon the points presented at the trial, find themselves in a better position than they would have been in had a bill of exceptions been tendered.

CROWDER, J.—I also think that this rule should be discharged. In the few observations I am about to make, I confine myself to the particular circumstances of this case, and do not wish it to be understood, that, in every case, counsel are bound to interrupt the judge in his summing up, at the peril of losing the right to move for a new trial on the ground of misdirection. As my Lord has stated, the law undoubt-

edly is, that, if a man by his own negligence contributes to the injury he sustains, he cannot maintain an action for it. Whether or not the plaintiff in this case in any degree contributed by his want of care to the accident he complains of, was a point very fit to be submitted for the consideration of the jury. But, throughout the case, that point was (avowedly) intentionally kept out of view by the defendants' counsel. Acting deliberately,—and no doubt very properly and very dexterously,—they attach the entire blame to the plaintiff himself. That course so deliberately taken by the counsel, is adopted by the learned judge; and, during the whole course of the summing up, the defendants' counsel never suggest the slightest wish to have the point now in question put to the jury. They clearly cannot be allowed, under these circumstances, now to *object that the learned judge adopted the line which they [*196 themselves advisedly took and pertinaciously adhered to.

MAULE, J.—It seems to me that doubt may reasonably be entertained whether an action of this sort, for negligence, against a railway company, which is an action of tort founded upon contract, stands in the same position in point of law as an action purely for a tort, as in the case of a collision between two vessels in a river, or two vehicles on a road,—where there is no special duty due from the owner of the one to the owner of the other. But, assuming that, if in this case it had been proved that there was any negligence on the plaintiff's part, the defendants would have been entitled to a verdict, notwithstanding the accident was in part brought about by their negligence,—the state of things at the trial was this:—On the part of the plaintiff, it was contended that the injury resulted entirely from the negligence of the defendants and their servants, and consequently that the defendants were liable. On the other hand, the defendants contended that the accident resulted solely from the plaintiff's own negligence. Both these propositions are perfectly true and good law. It is now said that there is a third proposition, viz., that, if the jury were satisfied that there was culpable negligence on both sides, the defendants are entitled to the verdict. Let us assume that to be so. It often happens in practice that numerous questions are raised upon the record, when one or two only are intended to be tried,—the rest being tacitly withdrawn, as tending to embarrass the real points which are meant to be presented. Here, the counsel on both sides were fully cognisant of the circumstance that a certain question of fact might have been raised upon the evidence; but nobody raised it, or desired to have it raised. I am not, I apprehend, to be *taken as having laid down the law incorrectly, because I followed [*197 the same course, and abstained from raising a point which the defendants' counsel, deliberately, as it seems to me, abstained from raising. It is as if the defendants' counsel had said, in so many words, —“I abstain from embarrassing the jury with any other question than that upon which upon consideration I have thought fit to rest my case.”

I do not think it was at all incumbent on me to put to the jury a question which nobody desired to have put. For these reasons, I concur with the rest of the court in thinking that this rule should be discharged.

Rule discharged.

In the matter of ANNE KELSEY, Wife of FREDERICK KELSEY.

April 26.

The court made an order under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's property,—upon an affidavit stating, that, having fallen into distressed circumstances, the husband *about two months before* left England for Australia, with the intention of never returning, and that he had ever since been living separate and apart from his said wife.

CREASEY moved for an order under the 3 & 4 W. 4, c. 74, s. 91, to enable Anne Kelsey, the wife of Frederick Kelsey, to convey certain property at Ryton-upon-Dunsmore, in the county of Warwick, to which she was entitled as heir-at-law of her late father, without the concurrence of her husband. The affidavit upon which the motion was founded. stated that the parties were married in the year 1838; that the husband had for twenty years, up to the beginning of 1852, carried on business as a cowkeeper in Bermondsey, but that, about three years ago, he was compelled to abandon his said business in consequence of his having lost all his cows through disease, and was reduced to great distress; that, from that time down to February, 1855, he was employed *198] as a labourer; that, finding that the wages he *received as such labourer was insufficient to maintain himself and family, he, on the 15th of February last, left England for Australia, with the intention, as the deponent believed, of never returning to this country; that the applicant had ever since been living apart from her said husband, nor had she since heard from him, nor did she know where he then was; that she had five children by her said husband, who with herself were left without the means of support; and that she had taken a house, with the intention of opening a shop, for the purpose of thereby obtaining the means of maintaining her family.

Per Curiam.—The affidavit sufficiently brings the case within the statute. The order may go.

Ordered “that the said Ann Kelsey be at liberty, by deed or surrender, to dispose of, release, surrender, or extinguish all her estate and interest of and in certain lands at Ryton-upon-Dunsmore, in the county of Warwick, containing, &c., in the affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the court by the said affidavit, that the said Frederick Kelsey is now, and has been since the month of February last, living separate and apart from his said wife.”

*STONE and Wife v. JACKSON. May 8. [*199

In an action for an injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured,—the evidence was that many persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from the street to the main road, by avoiding an angle; but that the owner of the premises, as often as he saw them, turned them back:—Held, no evidence to go to the jury of a “public way.”

THIS was an action brought to recover damages for an injury done to the female plaintiff, in consequence of the alleged negligence of the defendant in leaving a vault or cellar near a public footway uncovered.

The first count of the declaration stated, that the defendant, before and at the time of the committing of the grievance thereafter mentioned, was possessed of a messuage, with the appurtenances, *near to a common and public highway*, at the side of and near to which said messuage, and parcel of the appurtenances thereof, *and close to the said foot-way*, there then was a large hole, vault, pit, or cellar, which said hole, vault, pit, or cellar the defendant, by reason of the possession of the said messuage, with the appurtenances, before and at the said time of the committing of the grievance thereafter mentioned, ought to have efficiently guarded, fenced off, and railed in, so as to prevent damage or injury to any person or persons using the said foot-way, *and employing ordinary caution in the use thereof*: Yet that the defendant, whilst he was so possessed of the said messuage, and the said hole, vault, pit, or cellar, and premises and appurtenances, and whilst there was such hole, vault, pit, or cellar on the said premises, with their appurtenances, wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, vault, pit, or cellar, to be and continue, and the same was then so wholly unguarded, and fenced off, or railed in, that, by means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same the said Ann Stone, then being the wife of the said *George William Stone, *and who was lawfully using the said foot-way, and employing ordinary caution in the use thereof*, slipped and fell into the said hole, pit, vault, or cellar, and was thereby grievously bruised and injured; whereby the plaintiff Ann Stone suffered and underwent great pain and bodily suffering. [*200

The second count stated, that the defendant, whilst he was so possessed of the said messuage, hole, pit, vault, or cellar, and premises and appurtenances, and whilst there was such hole, pit, vault, or cellar on the said premises, with their appurtenances, as in the first count mentioned, wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, vault, pit, or cellar to be and continue, and the same was then, so wholly unguarded and not fenced off or railed in as in the first count mentioned, that, by means of the

22 C. L. J. 519.

premises, and for want of proper and efficient guarding, fencing off, and railing in of the same, the said Ann Stone, then being the wife of the said George William Stone, *and who was lawfully using the said foot way, and employing ordinary caution in the use thereof*, slipped and fell into the said hole, vault, pit, or cellar, and was thereby grievously bruised and injured, and so remained and continued for a long space of time; whereby the plaintiff George William Stone, during all that time, lost and was deprived of the comfort, benefit, and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, and was forced and obliged to pay, lay out, and expend a large sum of money in and about nursing and attending his said wife during her illness occasioned as aforesaid, and in and about the endeavouring to heal and cure his said wife of the bruises and injuries aforesaid, occasioned as aforesaid.

Pleas—first, not guilty.

*201] Secondly and sixthly,—to the first and second counts respectively,—that the defendant was not possessed of the said messuage, with the appurtenances, as in that count alleged.

Thirdly and seventhly,—that there was no such common and public footway as in the first and second counts respectively alleged.

Fourthly and eighthly,—that there was not, close to the said footway, such hole, vault, pit, or cellar, as in the first and second counts respectively mentioned.

Fifthly and ninthly,—that the said Ann Stone was not using the said footway, and employing ordinary caution in the use thereof, as in the first and second counts respectively mentioned.

Upon each of these pleas the plaintiffs joined issue.

The cause was tried before Maule, J., at the sittings at Westminster after last term. The facts which appeared in evidence were as follows:—The defendant was possessed of a house and premises, No. 1, St. Thomas's Place, Old Kent Road, at the corner of the Albany Road. There was a piece of garden ground in front of the house, with a fence on the side of the footpath in the Kent Road and Albany Road respectively. There was a gate (which was kept bolted) at the Kent Road side, leading to the door of the house, and also gate-posts, but no gate, near to the house at the Albany Road side. The plaintiff's wife, wishing to make a short cut diagonally across the garden, to get into the Kent Road, and having before seen others go that way, passed through the open gateway, and immediately fell into a vault or cellar, which was open and unfenced, and which was about a foot and a half or two feet within the fence, and was severely hurt. The accident occurred about half-past eight in the evening.

There was evidence to show that people frequently passed across the garden in the way Mrs. Stone was going; but the defendant swore that

they had no right *to go that way, and that he had repeatedly sent persons back. [*202

The learned judge suggested that possibly there might be a public footway across the garden,—though it was objected, on the part of the defendant, there was no evidence of that, and that, if there were, that would not be the footway mentioned in the declaration; and he left it to the jury to say whether or not there was such public footway.

The jury found that there was, and accordingly returned a verdict for the plaintiffs, damages 30*l*.

Byles, Serjt., on a former day in this term, obtained a rule nisi to enter a verdict for the defendant,—pursuant, as he said, to leave reserved,—or for a new trial on the ground of misdirection, and that the verdict was against evidence.

Montagu Chambers and *Lush*, on a former day, showed cause.—There was evidence to show that the public had repeatedly, and for a long time, used the way in question as a public way. The question was left to the jury, and they have by their verdict found that there was that right of way. But, even assuming that there was in strictness no right of way across this piece of ground, the defendant was bound to fence it so as to protect the public from injury. His knowledge that the public were in the habit of using the way, imposed upon him the duty of fencing the cellar, or replacing the gate. In *Sarch v. Blackburn*, 4 C. & P. 297 (E. C. L. R. vol. 19), M. & M. 505 (E. C. L. R. vol. 4), which was an action for an injury sustained by the plaintiff from the bite of a dog placed in the defendant's yard for the protection of his premises, Tindal, C. J., in leaving the case to the jury, said,—“If a man puts a dog in a garden, walled all round, and a wrongdoer goes into that garden, and is *bitten, he cannot complain in a court of justice of that which was brought upon him by his own act. The difficulty is in saying [*203 whether in the particular place the means adopted by the defendant were sufficient. We must see first whether the plaintiff had a justifiable and reasonable cause for being on the spot,—whether he was there without any notice, having such cause as would justify him if he had an action brought against him as a trespasser for being on the defendant's premises. It seems that there are three different entrances to the premises; one of them more public than the rest, having a spring gate; another, called the middle entrance, across a field; the third, an entrance across the cow yard, and through a private gate, and another yard, to the house. The plaintiff must have gone through one of the last two. Undoubtedly a man has a right to keep a fierce dog for the protection of his property; but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. I think he has no right to place a dog so near to the door of his house, that any person coming to ask for money, or on other business, might be bitten. And so with respect

to a footpath, though it be a private one; a man has no right to put a dog, with such a length of chain, and so near that path, that he could bite a person going along it." That is very like the present case. So, in *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67), A., being possessed of land abutting on a public footway, in the course of building a house on such land, excavated an area, which, by the negligence of his work-people, was left unfenced, so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area, and was killed,—and it was held that A. was liable, under Lord Campbell's Act, 9 & 10 Vict. c. 93, to an action *204] by the *husband, as administrator, for the benefit of himself and B.'s infant children. Maule, J., in giving judgment in that case, says,—“On the part of the defendant, it was argued that no use which a man chooses to make of his own property can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful enjoyment of that right; that, in the present case, the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area, though not fenced, could be in any degree detrimental or injurious.” And, after observing upon *Blythe v. Topham*, 1 Roll. Abr. 88, *Cro. Jac.* 158, *Coupland v. Hardingham*, 3 Campb. 898, *Jarvis v. Dean*, 8 Bingh. 447 (E. C. L. R. vol. 11), 11 J. B. Moore, 354 (E. C. L. R. vol. 22), and *Jordin v. Crump*, 8 M. & W. 782,† the learned judge proceeds,—“The result is,—considering that the present case refers to a newly-made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care,—it appears to us, after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for, the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public, is, in effect, as much impeded as in the case of an ordinary nuisance to a highway. With regard to the objection that the deceased was a trespasser on the defendants' land at the time the injury was sustained,—it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does: but he does not forfeit his right *205] of *action for an injury sustained. Thus, in the case of *Bird v. Holbrook*, 4 Bingh. 628 (E. C. L. R. vol. 18), 1 M. & P. 607 (E. C. L. R. vol. 17), the plaintiff was a trespasser,—and, indeed, a voluntary one,—but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury

would not have occurred, if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch v. Nurdin*, 1 Q. B. 37 (E. C. L. R. vol. 41), 4 P. & D. 677, and also in the case of *Jordin v. Crump*, in which the court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed, that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action." These cases show, that, although the place in question might not have been strictly a public way, the defendant was not therefore absolved from the duty of fencing off the vault, so as to prevent accidents to persons slightly deviating.

At all events, there was some evidence to go to the jury of this being a public way; and, if necessary, the record may be amended under the 222d section of the Common Law Procedure Act, 1852,—15 & 16 Vict. c. 76.

Byles, Serjt., in support of his rule, was stopped by the court.

JERVIS, C. J.—The rule in this case must be absolute either to enter a verdict for the defendant, or for a new trial. Inasmuch, however, as the learned judge does not report to us that he reserved any leave, we will speak to him before we pronounce judgment. There certainly is not the least evidence that this was a public way.

Cur. adv. vult.

*JERVIS, C. J.—We have communicated with my Brother [206 *Maule*, who says he has no recollection of having reserved any leave. The rule will, therefore, be absolute for a new trial, on the ground of misdirection.

Rule absolute accordingly.

CHILTON, Assignee of W. P. M. CROFT, an Insolvent Debtor, v. CARRINGTON and WHITEHURST. *April 25.*

In *detinue* for a lease, the court allowed the defendants, upon a rule to plead several matters, to plead, in addition to a denial of the detainer, the following pleas:—

1. That the plaintiff sued the defendants for the detention of the lease, and recovered judgment, in a former action, and issued execution, and took other proceedings to enforce the judgment, that the sum of 150*l.*, to secure which the lease was deposited, was still due, and that no tender of that sum had been made since the judgment in the said former action, nor had any demand of the lease been made after the termination of the proceedings in the said former action:
2. For a defence on equitable grounds, as to the detention of the lease,—that it was deposited to secure payment to the defendants of 150*l.* and interest, by way of equitable mortgage, upon the terms of an agreement in writing,—the former recovery, and proceedings thereon,—that the 150*l.* was still due,—that, after the commencement of this action, the defendants tendered and offered to deliver up the lease to the plaintiff upon payment of the 150*l.*, and the defendants also tendered and offered the plaintiff his costs of this action up to that time,—and that such tender and offer were refused.

DETINUE. The declaration stated, that the defendants, after the estate and effects of the said insolvent were vested in the plaintiff as assignee as aforesaid, and before the commencement of this suit,

detained from the plaintiff, as assignee as aforesaid, the goods and chattels of the plaintiff as assignee as aforesaid, that is to say, a lease of premises in Great Windmill Street, Haymarket, and a promissory note signed by the said insolvent, for payment on demand of certain money therein mentioned; and, by reason of the premises, and before this suit, the plaintiff, as assignee as aforesaid, was prevented from selling, and lost divers opportunities of selling, on advantageous terms, the said premises and term and interest therein, and was prevented from obtaining and receiving sums and prices for which he might have sold the same; and, by reason also of the premises, and of the inability of the *207] plaintiff, occasioned by the *defendants' wrong as aforesaid, to dispose of and part with the said premises, the plaintiff, as assignee as aforesaid, was obliged to keep persons in possession of the said premises, taking care of the same, for many months, and to expend moneys and part of the said estate and effects in so doing; and, by reason also of the matters aforesaid, and the said detention of the said lease, the plaintiff was prevented from selling the term and interest of the plaintiff in the said premises to one N. Graeshaber, who would have bought the same: and the plaintiff, as assignee as aforesaid, claimed a return of the said goods, or their value, and 500*l.* for their detention.

Raymond, on a former day in this term, obtained a rule calling on the plaintiff to show cause why the defendants should not have leave to plead the several matters following:—

1. A denial of the detainer.
2. A denial that the goods and chattels were the plaintiff's.
3. As to the detention of the lease,—that the plaintiff sued the defendants for the detention of the said lease, and recovered judgment, in a former action, and issued execution, and took other proceedings to enforce the said judgment; that the sum of 150*l.* to secure which the said lease was deposited, was still due, and that no tender of that sum had been made since the judgment in the said former action, nor had any demand of the lease been made after the determination of the proceedings in the said former action.
4. For a defence on equitable grounds, as to the detention of the said lease, that it was deposited to secure payment to the defendants of 150*l.* and interest, by way of equitable mortgage, upon the terms of an agreement in writing; the former recovery and proceedings thereon; *208] that the 150*l.* was still due; that, after the *commencement of this action, the defendant tendered and offered to deliver up the lease to the plaintiff upon payment of the said 150*l.*, and the defendants also tendered and offered the plaintiff the costs of this action up to that time; and that such tender and offer were refused.

He submitted that the defendants' refusal originally to take the 150*l.*

when offered, did not in equity deprive them of their right to hold the lease as security for that sum now.^(a)

Aspland now showed cause.—The third plea is clearly frivolous. It is to be assumed that the plaintiff did all that was requisite to entitle him to recover in the former action. The third plea is founded upon this, that what passed on that occasion amounted to a waiver of the plaintiff's claim to the lease; and, if it did so, it is put in issue by the first plea. There is no authority for saying that a demand is necessary in detinue. The verdict and judgment in the former action were taken, not for the value of the lease, but only for damages for its detention; that, therefore, could not be pleaded in bar.

Then, as to the fourth plea, which seeks to raise a defence on equitable grounds,—it is submitted that that is not a plea setting up an equitable defence, within the meaning of the 83d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. That section enacts that “it shall be lawful for the defendant, or plaintiff in replevin, in any cause in any of the superior courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief, by way of defence; and the said courts are thereby empowered to receive such defence by way of plea,—provided that such plea shall begin with the *words ‘for defence on equitable grounds,’ or words to the like effect.” The meaning of that section is settled by the Court of Exchequer, in the case of *Mines Royal Societies v. Magnay*, 10 Exch. 489.† There, to an action upon an indenture of lease, for non-payment of rent, and for non-repair of the premises, the defendant proposed to plead (inter alia) as a defence on equitable grounds, under s. 83, a plea to the following effect,—that it was agreed between the plaintiff and the defendant, that the latter should surrender the tenancy to the plaintiff, by yielding up possession of such portion of the premises as was in the occupation of the defendant, and by permitting the plaintiff to receive all future rents of such part of the premises as was occupied by the defendants' tenants, and by permitting the tenants to attorn to the plaintiff, the defendant to pay a certain sum of money, and give up certain machinery, all of which was to be done by the defendant, and accepted by the plaintiff, in satisfaction of the covenants of the lease; and that the lease and counterpart should be respectively given up to be cancelled. The proposed plea then alleged, that, in pursuance of such agreement, the defendant paid the plaintiff the said sum of money, and gave up the machinery, and delivered the lease to him, and that the plaintiff excused himself from delivering up the counterpart; that the defendant accordingly withdrew from the possession of the premises which he occupied, and had never since been in the enjoyment or occupation thereof, or in the receipt of the rents; and that he

(a) Vide 15 C. B. 95, 730 (E. C. L. R. vol. 80).

had always permitted the plaintiff to receive the same, and the tenants to attorn. It then proceeded to aver performance by the defendant of all other conditions precedent, and that the defendant was ready and willing to do all things necessary to be done by him for putting an end *210] to the tenancy; and that the action was brought in fraud and breach of the said agreement, and *that it was wholly the fault and laches of the defendant that the surrender was not completed. Upon an application for leave to plead several matters, the court refused to allow the above plea, holding that it did not disclose an equitable defence within the meaning of the statute. Alderson, B., there says: "This is a case in which a court of equity would possibly grant relief, by ordering the execution of a surrender; but the court would require that to be done by the defendant as a condition precedent: we have no such power. The 86th section provides, 'that, in case it shall appear to the court, or any judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a court of law, so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out, on such terms, as to costs or otherwise, as to such court or judge may seem reasonable.' We cannot do justice between these parties, which a court of equity would be fully competent to do, and would do by ordering a surrender to be executed." And Parke, B., said: "In my opinion, the equitable defence allowed to be pleaded by the statute, means, *such a defence as would in a court of equity be a complete answer to the plaintiff's claim, and would, as such, afford sufficient ground for a perpetual injunction*, granted absolutely and without any conditions. But, according to the statement in the plea, a court of equity would not interfere, except upon the condition of the execution of a valid surrender by the defendant. We have no machinery by which we can compel the execution of a surrender. The statute does not say that the courts of common law may give relief on equitable conditions, but that a plea shall be allowed which discloses a defence upon equitable grounds." [CROWDER, J.—That is rather a narrow construction of the act. JERVIS, C. J.—I think the defend- *211] ants ought not to be precluded from raising the *question of the construction of the statute upon the record. WILLIAMS, J.—If this plea is a good one, it seems to be based upon an equitable principle which courts of law do not recognise, viz. that that which is decreed to be done shall be considered as done.] Alderson, B., meets that view, in the case referred to. "It is too much," he says, "to say that a court of equity will presume that to have been done which it requires to be done as a condition precedent." This is, in effect, nothing more than a struggle between these parties as to which of them shall go into a court of equity. There is a further objection to this plea, viz. that it is only a plea to damages.

Raymond, in support of his rule.—The blunder in this case arose

from the defendants conceiving themselves to be entitled to hold the lease for something beyond that for which it was either legally or equitably mortgaged to them. All they now ask, is, that they may by the aid of the 83d section of the Common Law Procedure Act, be placed in a situation to avail themselves of any defence to this action which the law allows. They merely by this motion ask the court for leave to raise the question. If a proposed plea presents any fair arguable ground, the courts never shut it out. As to the equitable defence plea,—the court must see that in common honesty the defendants ought not to be compelled to give up the lease without being paid the 150*l.* they advanced upon it. There is no pretence, upon the language either of the 83d or the 86th section, that only such defences were intended to be let in as would afford ground for a perpetual injunction in a court of equity. Such a construction would render the provision almost entirely nugatory.

JERVIS, C. J.—Without giving any opinion as to *whether or [*212 not the Court of Exchequer have put a correct interpretation upon these provisions, in the case of *Mines Royal Societies v. Magnay*, it is enough to say that we think it right in this case to allow the proposed pleas.

The rest of the court concurring,

Rule absolute.

ANSTEY and Another v. EDWARDS. *May 8.*

To entitle a plaintiff in ejectment to call upon parties who are strangers to the record, to pay the costs, it must be clearly shown that the defence was conducted by them for their own benefit in the name of a pauper defendant; it is not enough to show that they are interested as equitable mortgagees of part of the premises, and that they have endeavoured to make terms with the plaintiff after judgment signed.

PRENTICE, on a former day in this term, moved for a rule calling upon James Rhodes, one of the registered public officers of The London and County Joint-Stock Banking Company, established under the 7 G. 4, c. 46, to show cause why the said copartnership should not pay to the plaintiffs their taxed costs of this action (amounting to 30*l.* 5*s.* 6*d.*), and 7*l.* 2*s.*, the costs of issuing and executing the writ of possession herein, or such portion thereof as the court should direct, together with the costs of the application.

The motion was founded upon an affidavit of the plaintiffs' attorney, which stated, in substance, as follows:—That this action was commenced on the 7th of November, 1854, and was an action of ejectment for the recovery of certain plots of building ground, together with the carcasses of certain messuages or tenements erected thereon, which said carcasses had been so erected by the defendant, and were, together with

the said plots of ground, in his possession at the time of the commencement of this action :

That the plaintiffs are the mortgagees of one Hopkins, the landlord of the property, who had granted a building contract to the defendant *213] of the ground sought *to be recovered in this action : and that the plaintiffs had jointly with Hopkins granted a lease of part of the said ground, together with two messuages or tenements partly erected thereon, by which he the defendant covenanted to complete the said messuages by a certain day therein named, and had failed in the performance of such covenant, and for the breach of this and other covenants in such building contract and lease respectively contained, this action of ejectment was brought :

That an appearance to this action was entered on or about the 23d of November, 1854, in the name of the defendant, by Mr. Clarke, the resident attorney of The London and County Joint-Stock Banking Company,—the defendant having on the 17th of October preceding filed a petition in the court of bankruptcy.

That the real defendants in this cause were the London and County Joint-Stock Banking Company ; and that, on the 8th of January last, the deponent saw a gentleman from the office of their said resident attorney, *who stated that the lease was held by the bank as security, and that the action was defended on their behalf*, and wished to ascertain if some arrangement could not be made, when the deponent expressed the plaintiffs' willingness to consider any offer he might make, but that such offer must contain an agreement to pay all the back rent then due both under the building contract and under the lease :

That, on the 12th of January, the defendant received from Mr. Clarke a letter in which he wrote,—“ This matter is before the directors with reference to the arrangement referred to in your interview with my clerk, Mr. Carter ; and I have little doubt, that, with your assistance, the result will be satisfactory to all parties. In the mean while, therefore, *I will consent to judgment and execution* in the same time as you *214] could obtain it by going to trial ;” and that the defendant *signed a confession of the action in the presence of Clarke, and judgment by confession was signed on the 31st, and a writ of possession afterwards issued and executed :

That the costs of the action were taxed on the 1st of February at 30*l.* 5*s.* 6*d.*, and the costs of the execution of the writ of possession were 7*l.* 2*s.* ; that every effort had been made to obtain the amount from the defendant, but without avail, he having become bankrupt :

That the costs were then demanded of Clarke, and on the 9th of February the plaintiffs' attorneys received the following communication from Messrs. Wilkinson & Co., “ also acting for the said bank,”—“ Your letter of the 7th instant, addressed to Mr. Clarke, and the papers in this matter, have been handed to us by our clients The London and County

Bank. We propose, on behalf of the bank, that they should pay the arrears of ground-rent due in respect of the two houses in Limestone Street, and your costs (as taxed) of the ejectment, and that your clients should grant the bank a new lease of the houses, similar to the present lease, except that the covenant to complete should be extended to Midsummer next;" but that this proposal was not accepted, the plaintiffs' attorneys declining to entertain any proposition until their costs were paid:

That, in answer to a subsequent application for the costs, fortified by a reference to the case of *Hutchinson v. Greenwood*, 4 Ellis & B. 324, Wilkinson & Co. wrote to the plaintiffs' attorneys,—“The case you have referred to does not apply here. Mr. Clarke entered an appearance for Mr. Edwards, who had a great interest in the property, and who was a client of his. Mr. Clarke was not instructed by the bank to defend the action; nor did he act for the bank in doing so. Under these circumstances, we do not think you can claim the costs of the bank;” and that some further correspondence *ensued in which the plaintiffs' attorneys insisted upon, and Wilkinson & Co. denied, the liability [*215 of the bank to the costs of the defence of the ejectment.

Hutchinson v. Greenwood, 4 Ellis & B. 324 (E. C. L. R. vol. 82), was referred to.

Lush showed cause, upon an affidavit by Mr. Clarke showing that the defendant was a client of his, that he was never authorized by the bank to defend the ejectment on their account, that all they sought, was, to secure their own interest as equitable mortgagees of part of the property, and that, after the plaintiff knew the nature of the interest which the bank had, he took the defendant in execution for the costs with which he now sought to charge the bank. No case has been made out for the summary interposition of the court, which is limited to the case of a party who is really interested setting up a defence in the name of a pauper. Besides, the fact of their having taken the defendant in execution after they were made acquainted with the real nature of the interest which the bank had in the premises, alone affords an answer to this application. All the authorities were considered, and the true rule laid down in the case cited, of *Hutchinson v. Greenwood*. There the action was defended at the expense and upon the retainer of the parties sought to be charged; and the majority of the court,—Erle, J., dissenting,—held, that, though strangers to the record, and claiming no interest in the property for themselves, they were liable for costs. Lord Campbell there says: “Mr. Addison admits, I think most properly, that, before the Common Law Procedure Act, 1852, the court would have had jurisdiction under such circumstances as these to order the persons who really conducted the defence in an action of ejectment, to pay the costs, though they were not parties on the record, or to the

*216] consent rule. *I had always thought that in this respect ejectment was a recognised exception; and, as long as I have known the law, it was considered established practice that the persons really employing the attorney and defending the ejectment were liable to be made to pay costs in this manner. In *Doe d. Masters v. Gray*, 10 B. & C. 615 (E. C. L. R. vol. 21), Lord Tenterden, a very cautious judge, lays down the rule as well established. He says,—‘In ejectment we can make the real party to the suit pay the costs,’ and there is good reason for this, as otherwise there might be great mischief. The persons really interested as landlords never would appear themselves, if they could cause an appearance to be entered in the name of a pauper tenant, and defend the suit without risk to themselves of having to pay the plaintiff’s costs; and so, when the plaintiff at last obtained judgment, there would be no available remedy for his costs. I cannot see that the Common Law Procedure Act, 1852, affects the question at all. The principle is, that the individuals who order an appearance to be entered in ejectment, in the names of those not really defending the suit, abuse our process, and that, as they substantially are the suitors, we have jurisdiction to make them pay the costs.” This, therefore, being clearly an experiment, the court will discharge the rule with costs.

Prentice, in support of the rule.—The correspondence set out in the affidavit upon which this rule was moved, shows that the defence to this action was really conducted solely for the benefit of the London and County Joint-Stock Banking Company. At the time the appearance was entered by Clarke, their resident solicitor, the nominal defendant had no interest in the matter: he had then filed his petition in the court of bankruptcy, and all his interest would necessarily pass to his assignees. The whole circumstances show abundantly *that this
*217] really was the defence of the bank. Then, the circumstance of the plaintiffs’ having taken Edwards in execution for these costs, ought not to deprive them of their remedy against the real defendants: it might have been urged as a ground of complaint if he had not used every endeavour to get the costs from Edwards.

JERVIS, C. J.—Upon these affidavits, it seems to me that we cannot take upon ourselves to say that the defence of this ejectment was really the defence of the banking company. On the contrary, it appears that Edwards had a substantial interest in the matter, and appeared by his attorney Clarke. It clearly is not a case within the rule, assuming it to be as laid down by Lord Campbell, on the admission of counsel, in the case cited. I think the rule must be discharged, and, as it was moved with costs, discharged with costs.

The rest of the court concurring,

Rule discharged, with costs.

*FRYER v. STURT. *May 8.*

[*218]

A cause was referred at the assizes at about three o'clock in the afternoon,—the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitration commenced at six o'clock the same evening, and all the witnesses were examined before twelve o'clock that night. The award was ultimately made in favour of the defendant, to whom the costs of the action were ordered to be paid, each party paying his own costs of the reference and a moiety of the expenses of the award:—Held, that a witness who did not arrive at the assize town until half past ten o'clock in the evening of the day of the trial, was not properly chargeable as a witness in the cause.

Where a cause at the assizes is over at three o'clock in the afternoon, the witnesses may reasonably be allowed the following day for their return home, though their place of residence be distant only about fifty miles, and accessible by trains on the same evening.

NOTICE of trial in this case was given for the Summer Assizes at Winchester in 1854. The commission day was Tuesday, the 11th of July. The cause was called on for hearing on the morning of the 18th, when, pending the examination of the plaintiff, who was the first witness,—viz. about three o'clock in the afternoon,—it was agreed that the cause should be referred,—the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator.

The arbitrator proceeded with the reference that same evening at six o'clock, and had heard all the evidence by half-past eleven; and he ultimately made an award in favour of the defendant, and thereby ordered the plaintiff to pay to the defendant his costs of the action, and that each party should bear his own costs of the reference and a moiety of the costs of the award.

One Pyne, a witness for the defendant, arrived at Winchester at about half past ten o'clock on the night of the 13th of July, whilst the reference was proceeding. He had been subpoenaed as a witness on the trial, and it was sworn that he was a material witness: but he was not examined.

Upon the taxation of the costs, the expense of Pyne's attendance was allowed as part of the costs of the cause. The master also allowed for the attendance of certain other witnesses for three days, viz. the 12th, 13th, and *14th of July, though it was submitted that there was [*219 ample time for their return to Poole, the place from which they came (which was distant about fifty-six miles by railway from Winchester), on the 13th, there being three trains for that place after the cause was agreed to be referred, viz. at 4.50, at 6.28, and at 7.8, by either of which the witnesses might have got home by a reasonable time that night; and, consequently, that, as they stayed at Winchester for the purpose of the reference only, the expense of their attendance for the additional day ought not to be allowed as costs of the cause.

Temple, on a former day in this term, obtained a rule calling on the defendant to show cause why the master should not be at liberty to

review his taxation. He submitted that Pyne was not a witness attending on the trial, and therefore that his expenses should have been charged as part of the costs of the reference, and not of the trial; and also that the master ought not to have allowed as part of the costs of the trial the attendance of the other witnesses on the 14th, when the cause had been disposed of.

Slade and *Maynard* now showed cause.—This rule is moved upon two grounds,—first, that the expenses of Pyne's attendance at Winchester were referable altogether to the reference, and not to the action, inasmuch as he did not arrive there until after the cause had been referred,—secondly, that too much was allowed for the attendance of the other witnesses. As to Pyne,—it is true he did not arrive at Winchester until after the cause had been referred; but, if the cause had proceeded in the ordinary way, he would have been in ample time, for, there could be no doubt but that the case would have lasted more than the remainder of that day. [CRESSWELL, J.—That is a very awkward *220] inquiry to enter *upon.] If the facts had been brought to the attention of the master,—which it was incumbent on the other side to do,—what is there that would have justified the master in refusing to allow the costs of this witness? Suppose the cause had been tried out, and Pyne had not been called,—and it is impossible to put the case higher than that,—would not the defendant have been entitled to the costs of his attendance? In Archbold's Practice, 10th edit. p. 1480, it is said: "Generally speaking, the costs of the reference are not costs in the cause. But, where a verdict is taken subject to a *certificate*, it is otherwise." [CRESSWELL, J.—Is any authority cited for that distinction?] Two cases are cited,—*Brown v. Nelson*, 13 M. & W. 397,† 2 D. & L. 405, and *Mackintosh v. Blyth*, 1 Bingh. 269 (E. C. L. R. vol. 8), 8 J. B. Moore, 211 (E. C. L. R. vol. 17). In *Mackintosh v. Blyth*, an arbitrator to whom it was referred to certify what verdict should be entered up, certified for the plaintiff, and orally communicated to the parties that each should pay his own costs of the reference, which was acceded to by them. The cause having been referred back to the arbitrator, he certified in the same way a second time, but omitted to give any direction as to the costs of the second reference: and it was held that the plaintiff was entitled to those costs,—the court saying, "In the absence of any specific direction, the costs must follow the verdict." The decision in *Brown v. Nelson* was, that the costs of witnesses examined before an arbitrator, on a reference of a cause, to prove the issues in the cause, are not costs in the cause, but costs of the reference. Upon the case of *Mackintosh v. Blyth* being referred to there, Pollock, C. B., said: "That was the case of a *certificate*, which is a totally different matter. No *award* is made in such a case; there is nothing but the verdict, the arbitrator being merely substituted for the jury, out of court; and all the costs of arriving at the verdict are costs

in the cause. *But, where there is a reference and *award*, the costs of the witnesses before the arbitrator are surely costs of the reference." [CRESSWELL, J.—That dictum rather points to the case of a reference of other matters.] Where the reference is of the cause only, it is but a continuance of the trial. [CROWDER, J.—What do you call costs of the reference?] There were two other meetings after the evidence was closed: those would be costs of the reference. [CRESSWELL, J.—Then you admit that there is a difference between the case of a certificate and that of an award? JERVIS, C. J.—The costs in the one case are taxed on the *postea*; in the other, on the *award*.] Then, as to the other witnesses,—The cause was referred at about three o'clock in the afternoon of Thursday, the 13th. The reference began at six o'clock in the evening, and, so far as the taking the evidence was concerned, ended at half past eleven. It is contended on the other side, that, inasmuch as there was a possibility of these witnesses getting home that same evening, they must be taken to have remained at Winchester till the 14th for the purpose of the reference, and not for the purpose of the cause. But, assuming that the cause was at an end when the agreement to refer was come to, were the witnesses bound to hurry away the same evening? In the uncertainty as to how long the cause would last, they must at least have ordered a dinner, and they must have engaged beds. It was not unreasonable that they should remain until the 14th.

[The Master, Mr. *Methold*, stated, that his attention had not been called to the fact of Pyne not having arrived at Winchester until after the cause was referred, or he should not have allowed his expenses as part of the costs of the cause; but that, as to the other witnesses, he had adopted the ordinary course of allowing them a day for coming to Winchester, their stay during the trial, and a day for returning home.]

**Montague Smith* and *Bevan*, in support of the rule. [JERVIS, C. J.—The master says he would not have allowed the attendance of Pyne, if he had been truly informed as to the facts.] The agent in London could not know the fact; and, the notice of taxation being only a day's notice, there was not time to obtain the information from the attorney in the country. Costs of the reference, are, the costs that are incurred before the arbitrator. It is so laid down in all the text-books. Thus, in *Russell on Awards*, p. 370, it is said: "When an award, and not merely a certificate, is to be made, the costs of the cause comprise the costs incurred in the cause up to the time of the submission, the costs of the order of reference, and of making it a rule of court, and the costs of ulterior proceedings in the cause, if any, after the award; but they do not include the expense of witnesses to prove the issues on the reference. The expense incurred by the parties of the whole inquiry before the arbitrator, whether with respect to the matters in the cause or the matters out of it are costs of the reference, as, for

instance, the costs of a brief in a cause referred, prepared after the reference, for the purposes of the arbitration. This is the case, even if the arbitrator expressly find that there are no matters in difference except in the cause. But, if the arbitrator be to make a *certificate*, as he is merely substituted for the jury out of court, and there is no award, and nothing but the verdict, all the costs of arriving at that verdict, which therefore necessarily include the costs of the proceedings before the arbitrator, are costs in the cause." And the rule is similarly laid down in *Watson on Awards*, p. 152. As to the other witnesses, seeing the short distance they were from home, and the early hour at which the cause was disposed of on the 13th, and the facilities there were for their return that evening, it was unreasonable to put the plaintiff to the expense of another day's stay at the assize town.

*223] *JERVIS, C. J.—It is much to be lamented, from whatever cause it arose, that the point, so far as it regards the witness Pyne, was not made before the master. If it had been, there would have been no necessity for the expense of this motion. But I think we must make the rule absolute to a certain extent. The cause was over before Pyne arrived at Winchester. It certainly would be very inconvenient to enter into an inquiry as to how long a cause would probably last. Suppose, instead of being referred at three o'clock, the cause had been ended by a compromise, Pyne not being then there, clearly he would not have been allowed as a witness in the cause. His attendance, therefore, should have been charged to the reference, and not to the cause. As to the other witnesses, I think the master was quite right in allowing them a day for coming, a day for staying at Winchester, and a day for returning home. Though true it may be, that, the cause being over at three o'clock, they had ample opportunity for getting home that evening, I think they were not bound to hurry away in the manner suggested. It was impossible to foresee when the cause would end. They must necessarily have ordered some refreshment, and no doubt would have made arrangements for sleeping at Winchester. I think the master was quite right upon that point. But, as to Pyne, the taxation must be reviewed.

CRESSWELL, J.—I also think the expenses of the witness Pyne ought not to have been allowed as costs in the cause. And the master tells us he would not have allowed them, if the fact of the non-arrival of that witness at the assize town until after the cause was called on and referred, had been communicated to him. As to that, therefore, the taxation must be reviewed. It would be manifestly inconvenient to speculate upon the probable duration of a trial; the parties, as we know *from experience, are so frequently mistaken in that, that
*224] it could be no just foundation for any decision. The true and only question is, was this man a witness in the cause. He clearly was not. As to the other point, we must look at it as if there had been no

reference at all. I see no reason to find fault with the master's discretion. The cause was over at three o'clock in the afternoon, and the witnesses had fifty-six miles to go. It was not unreasonable, therefore, to allow them a day for coming, a day for staying, and a day for returning. Upon that, therefore, there will be no rule.

WILLIAMS, J.—I am of the same opinion. It is contended on the part of the defendant, that all the expenses of the witnesses were costs in the cause. That, however, is not so. The cause was over, so far as concerned the question of expenses, as soon as it was brought to an end, whether it was by a verdict or by a reference. Afterwards comes a distinct proceeding, of which the defendant was not to be allowed the expenses. The distinction taken in the text-books is good, and is supported by the authorities. As far as regards Pyne's attendance, it mattered not how the cause came to an end. It was over at three o'clock, and he did not arrive at Winchester until half-past eleven. If there had been an absolute verdict, instead of a reference, nobody could contend for a moment that he ought to be allowed as a witness. The actual state of circumstances makes no difference in that respect. As to the other witnesses, I think the master was quite right. Much must necessarily be left to his discretion; and matters of this sort are not to be weighed in golden scales. The cause being unexpectedly at an end by three o'clock, though the witnesses might, by availing themselves of the earliest train, and quitting Winchester unrefreshed, or by travelling late at night, have arrived at home the same day, I think they were not bound to do so.

*CROWDER, J.—I entirely concur with the rest of the court upon both points. When the matter was before me at Chambers, [225 I looked upon it as a matter of practice which the master had decided, and that it was not unreasonable that Pyne should be considered as a witness in the cause. The rest of the court, however, think otherwise; and I am bound to agree with them. If this were *res integra*, I should incline to think it but reasonable that the costs of all the witnesses, whether examined at the trial or before an arbitrator, should be considered as costs in the cause. In this, it seems, I am mistaken. We are bound by the authorities. As to the other point, I agree that it was not unreasonable under the circumstances to allow the witnesses three days,—one for coming, one for staying for the trial, and one for returning home. In this I see no ground for finding fault with the master's decision.

Rule absolute accordingly.

In the Matter of ANNE COOPER. *April 27.*

Prior to the statute 18 & 19 Viet. c. 42, an affidavit sworn before the British consul at Paris, was not admissible in our courts.

PETERSDORFF moved for an order to dispense with the concurrence of the husband of Mrs. Cooper to the execution by her of a deed conveying her separate property, under the 3 & 4 W. 4, c. 74, s. 91. The affidavit upon which he moved was sworn before the British consul at Paris. [CRESSWELL, J.—Have you any affidavit to show that the British consul at Paris has authority to administer oaths?] The power of the British consul to take an affidavit of debt, was doubted by the Court of King's Bench, in *Pickardo v. Machado*, 4 B. & C. 886, 7 D. & R. 748: and this court, in *Ex parte Hutchinson*, 1 M. & P. 559 *226] (E. C. L. R. vol. 17), 4 Bingh. 606 (E. C. L. R. vol. 13), held that the British consul at Boulogne had no authority under the statute 6 G. 4, c. 87, s. 20, to administer an oath of the acknowledgment of a party levying a fine. But he submitted that the great practical inconvenience of such a course would probably induce the court to relax the rule.

Per Curiam.—The statute 6 G. 4, c. 87, s. 20, did not authorize the British consul at Paris to take this affidavit. We cannot, therefore, receive it. Rule refused.(a)

(a) This difficulty is now removed by the recent statute of 18 & 19 Viet. c. 42, which, reciting the 6 G. 4, c. 87,—enacts in s. 1, that, “from and after the passing of this act, it shall and may be lawful for every British ambassador, envoy, minister, chargé d'affaires, or secretary of embassy or of legation, exercising his functions in any foreign country, and for every British vice-consul, acting consul, pro-consul, or consular agent (as well as every consul general or consul) exercising his functions in any foreign place, whenever he shall be thereto required, and whenever he shall see necessary, to administer in such foreign country or place any oath or to take any affidavit or affirmation from any person whomsoever, and also to do and perform in such foreign country or place all and every notarial acts or act which any notary public could or might be required and is by law empowered to do within the united kingdom of Great Britain and Ireland; and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, vice-consul, acting consul, pro-consul, or consular agent, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if such oath, affidavit, or affirmation, or notarial act, respectively, had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public in any part of the united kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature.”

And the 2d section enacts that affidavits taken before ambassadors, &c., abroad, may be used in any court of law or equity in the united kingdom.

***CLARKE v. ARDEN. April 27.**

[*227]

A lease granted by a copyhold tenant, under a license of the lord, is not affected by a forfeiture of the tenant's estate,—such license operating as a confirmation by the lord; and, consequently, pending the term created thereby, the lord cannot maintain ejectment for the land.

And it is competent to a purchaser of the tenant's interest in the copyhold tenement, who comes in and defends as landlord, and who is in receipt of the rents, to set up the lease as a bar to the lord's claim.

Quære, whether a copyhold tenant, who has become bankrupt, can be guilty of a forfeiture by disclaiming to be tenant of the manor, after a conveyance of his interest in the premises to a purchaser under the fiat?

The circumstance of the judge having left an immaterial question to the jury, with a direction, that, if they find it one way, they must return a verdict for the defendant, does not entitle the plaintiff to move for a new trial, if upon all the other facts of the case the defendant is clearly entitled to the verdict.

THIS was an action of ejectment brought by the lord of the manor of Dunsford, in the county of Surrey, to recover certain buildings and land, parcel of the manor, upon an alleged forfeiture by the copyhold tenant.

In the writ, which was tested on the 25th of October, 1852, the premises were described as “a certain dwelling-house and malt-house, with the outbuildings thereto belonging, and a piece of land, consisting of one acre or thereabouts, adjoining thereto and used therewith as a garden, situate in Bridgefield, and which premises were formerly known as ‘All that one acre of copyhold or customary land, being in Bridgefield, in Wandsworth, within and parcel of the manor of Dunsford, together with the dwelling-house, malt-house, barn, and buildings thereon erected,’ with their appurtenances, in the parish of Wandsworth in the county of Surrey.”

The defendant on the 8th of November appeared to the writ, and defended for the whole of the land and property therein mentioned.

On the 8d of May, 1832, Frederick Thomas West was admitted, under the will of his father, John West, a late copyhold tenant of the manor of Dunsford, as tenant in fee, according to the custom of the manor, amongst other hereditaments, to certain lands and buildings, held of that manor, and which are the subject of this ejectment, comprising a dwelling-house, with *a malt-house adjoining, and a [*228 large garden, and six tenements and gardens, all situate in Bridgefield, in the parish of Wandsworth. The admission was as follows:—

“The court baron of the Right Hon. George, Lord Viscount Middleton, &c., lord of the said manor, there held in and for the said manor on Thursday, the 3d of May, in the 2d year of the reign of our Sovereign Lord William the Fourth, and in the year of our Lord 1832, by Reginald Bray, gentleman, deputy of William Bray, Esq., steward there:

“At this court it is presented by the homage, and thereupon enrolled by the steward there, that John West, Esq., late one of the copyhold

customary tenants of this manor, whose death was presented at a court-baron held for this manor on the 19th of April, 1831, had in his lifetime duly surrendered his copyhold or customary premises held of this manor to the uses of his will, and that he duly made and published his last will and testament in writing, bearing date the 29th of March, 1827, which was attested by three witnesses, whereby, in pursuance and performance of a covenant contained in the settlement executed on his marriage with his wife Elizabeth West, he gave and bequeathed to his said wife and her assigns, for her life, an annuity or clear yearly sum of 200*l.*, payable as therein mentioned, and he thereby charged all and every his real and personal estates with the payment of the said annuity, and, subject thereto, he devised to his son Frederick Thomas West all his copyhold messuages, lands, tenements, and hereditaments, situate and being in the parish of Wandsworth, in the county of Surrey, with their and every of their appurtenances, to hold the same to his said son Frederick Thomas West, his heirs and assigns, according to the custom of the manor whereof the same are holden, and subject to the *229] rents, fines, *heriots, and services to be therefor paid, rendered, and performed; but, in case his said son Frederick Thomas West should depart this life without leaving lawful issue living at his decease, then, subject and charged as aforesaid, the said testator gave and devised the said copyhold estates unto his son William Henry West, his heirs and assigns, according to the custom of the manor aforesaid, and subject to the rents, fines, heriots, and services to be therefor paid, rendered, and performed:

“And now at this court, in the third proclamation, cometh, &c.(a)

“Also at this court, on such third proclamation, cometh the said Frederick Thomas West, by W. B. S., his attorney, and humbly prayeth that he may be admitted tenant of the lord of the manor to All that one acre of copyhold or customary land lying in Bridgefield, in Wandsworth, within and parcel of this manor, together with a dwelling-house, malt-house, barn, and buildings thereon erected, with their appurtenances, of which the said John West died seised, as presented at the said court-baron held for this manor on the 19th of April, 1831: And thereupon the lord of this manor, by his deputy-steward aforesaid, and by the rod, doth now at this court grant the same unto the said Frederick Thomas West, by his attorney aforesaid, To have and to hold the same, with the appurtenances, unto the said Frederick Thomas West, for such estate and interest as he is entitled to therein, under and according to the true intent and meaning of the will of the said John West, deceased, or otherwise, and subject and charged as in the said will mentioned, of the lord of this manor, by the rod, and by copy of court roll, at the will of the lord, according to the custom of this

(a) This related to other premises, not in question in this action.

manor, by the yearly *rent of 8*d.*, heriot, fealty, suit of court, [*230 and other services and customs therefor formerly due and of right accustomed: And (saving all rights of the lord whatsoever) the said Frederick Thomas West, by his attorney aforesaid, is admitted tenant thereof in manner and form aforesaid, hath seisin by the rod, and giveth and payeth to the lord for a fine, &c.: And his fealty is respited.

“Fines in all, 170*l.*”(a)

On the 20th of September, 1837, the lord of the manor, by Reginald Bray, his steward, granted a license to Frederick Thomas West to demise the messuage, malt-house, garden, and out-houses, the subject of this ejectment, to one Thomas Donaldson. The license was as follows:—

“The Manor of Dunsford, } Be it remembered, that, out of court, on
in the county of Surrey. } the 20th of September, 1837, the lord
of the said manor, by Reginald Bray, Esq., steward of the courts of the
said manor, did grant license to Mr. Frederick Thomas West, one of
the copyhold or customary tenants of the said manor, to demise and to
farm let to Thomas Donaldson, of, &c., all that capital or customary
messuage or dwelling-house, malt-house, garden, and out-houses thereto
belonging, situate in Bridgefield, in Wandsworth, within and parcel of
this manor, late in the occupation of George Hudson (to which premises
the said Frederick Thomas West was admitted tenant at a court-baron
held for the said manor on the 3d of May, 1832), for any term or num-
ber of years not exceeding twenty-one years from Michaelmas Day now
next, saving and reserving to the lord of the said manor all and all
manner of fines (in imposing whereof no regard is to be had to the rent
to be reserved in such lease), rents, services, and customs therefor for-
merly due and of right accustomed: *And for such license the [*231
said Frederick Thomas West hath given and paid to the lord for
a fine 1*l.* 1*s.*”

In pursuance of this license,—which was duly entered on the court-rolls of the manor,—by indenture of lease dated the 29th of September, 1837, West demised the premises to Donaldson for the term of twenty-one years from the date of the lease, at the annual rent of 93*l.* 15*s.*

On the 30th of May, 1838, West surrendered the premises to the Rev. Francis Curtis, conditionally, for securing the sum of 1000*l.* and interest. The surrender was as follows:—

“Manor of Dunsford, } Be it remembered, that, on the 30th of
in the county of Surrey. } May, 1838, came Frederick Thomas West,
of, &c., one of the customary or copyhold tenants of this manor, and
did out of court surrender by the rod into the hands of the lord of this
manor, by the acceptance of Reginald Bray, Esq., steward of the courts

(a) This included other property besides that now in question.

of the said manor, according to the custom thereof, all that piece or parcel of copyhold or customary land or ground situate at Bridgefield, in Wandsworth, within and parcel of this manor, together with a dwelling-house, malt-house, barn, and buildings thereon erected, with their respective appurtenances (to which the said Frederick Thomas West was admitted tenant at a court-baron holden for this manor on the 8d of May, 1832), and all the estate, right, title, and interest, at law or in equity, of the said Frederick Thomas West, in, to, or out of the said hereditaments, To the use and behoof of the Rev. Francis Curtis, of Cranbrook, in the county of Kent, clerk, his heirs and assigns for ever, according to the custom of the said manor, subject nevertheless to the proviso or condition hereinafter contained, that is to say, Provided always, and these presents are upon this express condition, that, if the *232] said Frederick Thomas West, his heirs, executors, *or administrators, or any of them, shall and do well and truly pay or cause to be paid to the said Francis Curtis, his executors or administrators, on the 26th of November now next ensuing, the full sum of 1000*l.* of lawful money of Great Britain, with interest for the same in the mean time after the rate of 5*l.* for every 100*l.* by the year, being the same sum of money as is mentioned in and intended to be secured by a certain indenture already prepared, and intended to bear even date herewith, and made between the said Frederick Thomas West of the first part, William Cory and Russell Scott, of, &c., of the second part, and the said Francis Curtis of the third part (being a mortgage of the same and other property, upon which the proper ad valorem duty has been affixed), without any deduction or abatement whatsoever, then this surrender to be void and of none effect, or else to remain in full force and virtue."

Admission was never taken by Mr. Curtis upon this surrender: and West continued to be tenant on the roll down to the time of his bankruptcy hereinafter mentioned.

On the 20th of December, 1841, a fiat in bankruptcy was issued against West, who was thereupon duly adjudged a bankrupt.

On the 5th of May, 1843, West's assignees, with the consent of the commissioner, put up the premises which are the subject of this action, to sale by public auction, at Garraway's Coffee-House; and the present defendant became the purchaser at such sale for 1015*l.*

On the 1st of December, 1843, West's assignees, with the consent of West and of Curtis,—and pursuant to a license from the lord, dated the 31st of October, 1841, in the same terms as those of the license to demise to Donaldson,—demised the residue of the premises which were held by West as tenant of the manor of Dunsford, described as "All those five cottages, formerly a barn, together with the field or close of *233] land *thereto adjoining, containing half an acre, or thereabouts, be the same more or less, situate, lying, and being in Bridgefield,

in Wandsworth, within and parcel of this manor," to one John Leach Bennett, for fourteen years from Christmas, 1842.

On the 30th of May, 1844, by indenture of that date, the commissioner, in execution of the fiat against West, bargained and sold the premises so agreed to be purchased by him, to the defendant, to hold to him, his heirs and assigns for ever, at the will of the lord, and according to the custom of the manor, discharged from the mortgage to Curtis, and from all principal money and interest thereby secured; but subject, as to part of the premises,—being the premises the subject of this action,—to the lease of the 29th of September, 1837, made between West of the one part and Donaldson of the other part: and the commissioner thereby empowered and authorized Mr. J. D. Tinney, at the then next or any subsequent court, or out of court, so soon as might be, to surrender the said premises into the hands of the lord, to the use of the defendant, his heirs and assigns, at the will of the lord, and according to the custom of the manor.

No surrender was ever made by Tinney pursuant to the authority given to him by this deed: and many negotiations took place between the defendant and the steward of Lord Middleton, the then lord of the manor, as to the amount of the fine to be paid by the defendant on his admission as tenant, down to the year 1851, when the plaintiff purchased the manor from the trustees of Lord Middleton.

Shortly after the plaintiff became possessed of the manor, viz. on the 16th of December, 1851, he sought to compel Mr. Curtis to come in and be admitted upon the conditional surrender made to him by West on the 30th of May, 1838; and the following entry appears *upon [234 the court-rolls under the date of the 16th of September, 1851:—

"At this court it is presented by the homage, and thereupon enrolled by the steward there, that the condition of the surrender of certain copyhold land and premises holden of this manor, made by Frederick Thomas West to the Rev. Francis Curtis, and which surrender was presented at a court-baron holden for this manor on the 4th of February, 1839, was not performed according to the tenor, purport, and effect of the said surrender and the condition thereof, which by the said surrender has become absolute; and now at this court the first proclamation is made, that, if the said Francis Curtis, or any person or persons having right to the said copyhold or customary land and premises which came into the hands of the lord of this manor on the said surrender of the said Frederick Thomas West aforesaid, will come into court to take the same out of the hands of the lord, he, she, or they shall be heard; but no one cometh: therefore the first default is now recorded."

Notice of the above proclamation or presentment was given to the defendant; but nothing further appeared to have been done upon it. The defendant was then required to come in and be admitted; but, inasmuch as the lord demanded two fines,—one as upon the admission

of Curtis, the other for his own admission, and conceiving the amount demanded to be exorbitant and unreasonable, he declined to come in at all, but insisted that West was still tenant upon the roll as a trustee for him.

On the 23th of July, 1852, the following notice or summons was served upon West:—

“The Manor of Dunsford, in the county of Surrey.

“Mr. F. T. West.

“Sir,—You are required to attend a court-baron for the manor of Dunsford, to be held at the Antelope *Tavern, in the High Street,
*235] Wandsworth, on Tuesday the 3d of August next, at one o'clock in the afternoon precisely, to pay your quit-rents, fines, and other duties as of right you ought to perform and render the same at said court.

“Dated this 28th of July, 1852. WILLIAM FIELD, Bailiff.”

To this notice, West, on the same day, sent the following reply:—

“To the steward of the Manor of Dunsford.

“Sir,—I have to acknowledge the receipt of your summons to attend a court-baron at Wandsworth on Tuesday next, the 3d proximo: but I beg to state that I am not now a copyholder of the manor of Dunsford, and therefore disclaim all liability to pay to the lord of that manor the quit-rents, fines, and other duties indicated in the summons referred to on the other side.”

On the 3d of August, 1852, at a court held for the manor of Dunsford, West's letter was presented; and the following presentment appears upon the court-rolls:—

“At this court it is presented by the homage, and thereupon enrolled by the steward there, that Frederick Thomas West, who held to him certain copyholds to which he was admitted tenant on the 3d of May, 1832, having been personally summoned, has subtracted his services, and disclaimed the lord, as appears by the letter now presented, and which reads as follows,” [setting it out.]

In August, 1853, the plaintiff served notices upon Bennett and the administratrix of Donaldson, respectively, informing them that West's estate was forfeited, and requiring them to pay the future accruing rents to him, and to attorn to him. The tenants, however, continued to pay their rent to the defendant.

Further negotiations took place between the plaintiff *and the
*236] defendant as to the amount of the fine to be paid on the admission of the latter,—the plaintiff claiming 313*l.* and the defendant offering 222*l.* (being two years' rent),—but they produced no result.

A surrender was then prepared, pursuant to the bargain and sale of the 30th of May, 1844, and tendered to the steward, who declined to accept it, on the ground that West had been guilty of a forfeiture.

It appeared that the rent received by the defendant for the premises

in question was 93*l.* 15*s.* for one portion, and 15*l.* for the rest,—together 108*l.* 15*s.*

Mr. Bray, who had been steward of the manor for about twenty-five years, proved that the customary fine on a surrender and admittance was two years' rent; but that, if the party came in promptly, a year and a half's rent was usually taken.

The cause was tried before Coleridge, J., at the Spring Assizes at Kingston in 1853.

On the part of the defendant, it was objected, that he was not bound to come in and be admitted, in the absence of a special custom, or at all events not so long as West remained tenant on the roll, he being a trustee for him; that West's letter of the 28th of July, 1852, was not such a disclaimer as to work a forfeiture, but at most could only entitle the lord to seize quousque; that the plaintiff at all events was not entitled to the possession so long as the leases to Donaldson and Bennett remained in force; and that the fine demanded for the defendant's admission was unreasonable and excessive.

For the plaintiff it was submitted, that West's letter of the 28th of July, 1852, was a disclaimer of the lord's title, and an absolute forfeiture; that the lease to Bennett was not a lease granted in conformity with the license; that, assuming the leases to Donaldson and Bennett to be subsisting leases notwithstanding the forfeiture, it was not competent to the defendant, who *claimed to defend as landlord, to [*237 set up those leases; and that the defendant had never put himself in a position to object to the reasonableness of the fine demanded, inasmuch as he had never been admitted.

The learned Judge, reserving the points of law, left it to the jury to say whether or not the fine demanded for the admission of the defendant, was demanded as preliminary to his admission, and whether it was unreasonable in amount; telling them, that, if they found these questions in the affirmative, the defendant was entitled to their verdict.

The jury found both those questions in the affirmative, and the learned judge accordingly directed the verdict to be entered for the defendant, reserving leave to the plaintiff to move, with a view to the facts being stated in a special case for the opinion of the court.

Bramwell, in Easter Term, 1853, obtained a rule nisi for a new trial, on the ground of misdirection, the learned judge having left to the jury an immaterial issue, viz., the reasonableness or unreasonableness of the fine demanded; and, the parties having failed, after much negotiation, to agree in the statement of a special case, the rule came on for argument.

Channell, Serjt., and *Lush*, showed cause in Hilary Term last.—The facts are shortly these. In 1832, one West became tenant of the copyholds in question, having been admitted thereto on the death of his father. In 1837, West obtained a license from the then lord of the

manor, Lord Middleton, to lease part of the premises to one Donaldson for twenty-one years, and in 1841, he obtained a similar license to lease the other part to one Bennett, for fourteen years. These two leases were accordingly granted, and were subsisting leases at the time this *238] ejectment was brought. In *1839, West made a conditional surrender in favour of one Curtis; but Curtis never came in. In 1841, West became bankrupt. His assignees sold his interest in the copyhold tenements to the defendant, and Curtis was a party to the conveyance to him. Upon the defendant's seeking to be admitted, the plaintiff, who had become possessed of the manor by purchase from the trustees of the late Lord Middleton, at first insisted upon two fines,—one, as upon the admission of Curtis, the other for the defendant's admission; but, ultimately, he demanded one fine of 313*l.*, the yearly value of the premises being 93*l.* 15*s.* and 15*d.* The jury found that that was an unreasonable demand. This rule was moved on the ground that the question as to the reasonableness of the fine, was an immaterial question, and ought not to have been submitted to the jury. Be that as it may, it is no ground for a new trial, if upon the whole undisputed facts of the case the defendant is clearly entitled to retain his verdict.

The first point that arises, is, as to West's disclaimer. It is submitted,—first, that it was not competent to West after his bankruptcy to disclaim,—secondly, that if it were competent to him to disclaim, he did not in fact do so,—thirdly, that his disclaimer could only operate a forfeiture of his own interest, and could not affect the validity of the leases granted by him under the lord's license.

1. The case of the bankruptcy of the copyhold tenant is provided for by the 6 G. 4, c. 16. The 68th section enacts, “that the commissioners shall have power, by deed indented and enrolled in any of His Majesty's courts of record, to make sale for the benefit of the creditors, of any copyhold or customaryhold lands, or of any interest to which any bankrupt is entitled therein, and thereby to entitle or authorize any person or persons on their behalf to surrender the same for the purpose of *239] *any purchaser or purchasers being admitted thereto.” And the 69th section enacts, “that every person to whom any sale of copyhold or customary lands or tenements shall be made by the commissioners, shall, before he enter into or take any profit of the same, agree and compound with the lords of the manors of whom the same shall be holden, for fines, dues, and other services as theretofore have been usually paid for the same; and thereupon the said lords shall, at the next or any subsequent court to be holden for the said manors, grant unto such vendee, upon request, the said copy or customary lands or tenements, for such estate or interest as shall have been so sold to him as aforesaid, reserving the ancient rents, customs, and services, and shall admit him tenant of the same.” After his bankruptcy, as West could not surrender, so neither could he disclaim. The disclaimer was

evidently brought about by collusion between the plaintiff and West. [JERVIS, C. J.—The defendant should have got himself admitted, and paid the lord's fine. Instead of that, he says,—“I am not bound to come in and be admitted: you have already a tenant on the roll;” whereupon the lord might very fairly say,—“If West is still tenant, I will make him disclaim.”] The effect of the statute is, that it wholly incapacitates the bankrupt: West's act, therefore, was as a disclaimer void.

2. Then, did West in fact disclaim? He does not in his letter of the 28th of July, 1852, say that Clarke has no title as lord; but merely that he, West, in consequence of his bankruptcy, has ceased to have any interest in the copyhold, and therefore would not any longer pay quit-rents or do service.

3. With respect to the leases, they clearly are not affected by the forfeiture of West. In *Scriven on Copyholds*, 4th edit. p. 439, it is said that “A copyholder who has leased with license, may forfeit his interest in *reversion or remainder, a reversioner or vested remainder-man being in the seisin equally with a tenant in possession; but such forfeiture will not affect the lease:” for which he cites *Turner v. Hodges*, Hutt. 101, 102, Litt. Rep. 233, Hetley, 126, Gilb. Ten. N. CLIII; *Whittingham's Case*, 8 Co. Rep. 45 a; *Swinerton v. Miller*, Hob. 177; Vin. Abr. *Copyhold* (N. e) pl. 5. The passage in Viner is from the judgment in *Turner v. Hodges*, Hutt. 102,—“If a copyholder makes a lease for twenty years, with the license of the lord, and after *dies without heirs*, yet the lease shall stand against the lord, by reason of his license, *which amounts to a confirmation*.” Again, in *Scriven*, p. 461, it is said,—“A lease of copyholds with license is extendable at law, and will be good, the author apprehends, even against the lord claiming by escheat, or by an act of forfeiture, if the license were granted by him, or by a former lord seised in fee-simple of the manor; (a) but such a lease would not be good against the lord entitled in remainder or reversion:” for which he cites the same authorities as he cites before. If this be a forfeiture at all, it is a forfeiture of the reversion, and therefore ejectment will not lie: see 8 & 9 Vict. c. 106, s. 9; Co. Litt. 215 b.

Bramwell and *Petersdorff*, in support of the rule.—West being the tenant upon the roll, and so continuing down to the time of his disclaimer in July, 1852, he is the only person the lord is bound to recognise: he is tenant on the roll for all purposes, even for the purpose of working a forfeiture. Thus, in *Scriven*, p. 123, it is laid down that “there can be no substitution of a person into the tenancy but by a surrender,—*Knight v. Cooke*, 2 Qb. Cas. 43,—nor is such substitution

(a) But the learned author adds in a note,—“It may be doubtful in such a case whether the lessee would not be discharged from the payment of any rent.”

*241] *complete until admittance." Again, p. 447, it is said,—“It should seem that a forfeiture can only arise by the act of the tenant, and therefore, that, if a disseisor, or a surrenderee before admittance, or a cestui que trust, or a guardian, or a stranger without the assent of the copyholder (or even with the assent of the copyholder if a feme covert), commit waste, it is no forfeiture.” “A surrenderor, whether the surrender be by way of sale or mortgage, is, until admittance of the surrenderee, to be regarded as a trustee, as far as relates to the lord’s right of entry for a forfeiture, either by attainder, or an act of waste, or otherwise; the Court of King’s Bench having decided in a case where by the custom of the manor the copyhold lands are forfeited by conviction of felony, that the conviction in a charge of felony against a copyholder who had surrendered by way of mortgage, was a cause of forfeiture,—*The King v. Lady Jane St. John Mildmay*, 5 B. & Ad. 254 (E. C. L. R. vol. 27), 2 N. & M. 776 (E. C. L. R. vol. 28): for, as a surrenderor is tenant for all purposes of service until the admittance of the surrenderee, so he is tenant for the purpose of forfeiting; and the court therefore held, in that case, that a peremptory mandamus to the lady of the manor to admit the surrenderee ought not to issue.” All that the surrenderee before admittance has, is, an inchoate right to be admitted. [MAULE, J.—Other persons may be considered tenants inter se: but the only person the lord can look to, is, the tenant actually upon the roll.] By the 13 Eliz. c. 7, s. 2, the commissioners were empowered to take by their discretions order and direction with the lands, &c., of the bankrupt, “as well copy or customaryhold as freehold;” and s. 3 is substantially the same as s. 69 of the 6 G. 4, c. 16. The last-mentioned statute, however, was evidently framed upon a totally different principle from the former: the object was, to prevent the copyhold passing by the act to the assignees.

*242] The proper course to have pursued here, *would have been, for the person appointed under s. 68, to surrender to the use of the now defendant, and for the defendant to have then come in and compounded with the lord under s. 69. Scriven, speaking of the statute, says,—p. 302,—“By the 68th section of the bankrupt act of 6 G. 4, the commissioners were empowered, by deed indented and enrolled in any of His Majesty’s courts of record, to make sale for the benefit of the creditors of the bankrupt’s copyhold or customary lands, or of his interest therein, and thereby to authorize any person on their behalf to surrender the same for the purpose of the purchaser’s being admitted thereto; and the 69th section directed that the vendee should compound with the lord for the accustomed fine, &c., and that thereupon the lord should grant to him the copyhold land for the interest which should have been sold to him, and admit him tenant thereof: and the author apprehends that the effect of those provisions was, to render the bargain and sale by the commissioners of the bankrupt’s copyhold pro-

perty to the purchaser a transfer of the *beneficial* right only, and to make the surrender under the authority contained in that deed the operative conveyance, as regards the *legal* customary interest; and the more usual practice has been for the commissioners to authorize the bankrupt himself to make the surrender for the purpose of the purchaser's admission under the 68th section of the last-mentioned act, which surrender would have the effect of divesting the bankrupt of his legal interest, in case the commission or the proceedings under it were open to any impeachment for irregularity." In 2 Watkins on Copyholds, 4th edit. 342 n., it is said,—“Some difficulty necessarily arises from the copyhold property of the bankrupt being exempted from the operation of the 61st section of the act, whereby the legal estate is thrown back upon the bankrupt. But, though he may perhaps be said to have the beneficial ownership *of the property till sale by the assignees, [*243 yet any sale by him to a purchaser for value without actual notice, would, it is apprehended, be liable to be overreached by an appointment from the assignees to a purchaser pursuant to the act. There is not any specific period marked out by the act within which enrolment is to be effected, but it should be remembered that no estate passes till enrolment, though, on the completion of that ceremony, the previous admission of the purchaser will be rendered valid. The legal estate, however, will not be vested in him as from the period of his admittance, but only from the time of enrolment: *Bennett v. Gandy*, Carth. 178. It is not essential that the *bankrupt* himself should surrender to the purchaser's use, but, if he can be prevailed on to make such confirmatory assurance, the precaution of obtaining his concurrence should not be neglected." It is plain, therefore, from the reason of the thing, as well as upon authority, that, until the power conferred under the statute has been acted upon, the interest in the copyhold for all legal and technical purposes still remains in the copyholder. [MAULE, J.—The lord was proceeding, not for a forfeiture by the present defendant, but for a forfeiture by a person who was of capacity to forfeit, subject to the rights of certain persons to be enforced in a certain way. *Channell*, Serjt., suggested that a seizure for a defeasible forfeiture is a seizure quousque; and, if so, it should so appear upon the roll.] A seizure quousque is a seizure of the copyholder's estate: whereas, here, the lord entered for a forfeiture in right of his own estate.

Then, it is said, that, assuming that West could be guilty of a forfeiture, his refusal to pay quit-rents and to do suit and service at the lord's court did not work a forfeiture. Being duly summoned, he repudiates his liability to be called upon, saying that he is no longer tenant to the lord; and his disclaimer is entered on the *roll. In Coke's Copyholder, p. 131, it is said: “Of acts which amount to for- [*244 feiture, some are forfeits eo instante that they are committed, some are not forfeits till presentment. Offences which are apparent and notori-

ous, of which the lord by common presumption cannot choose but have notice, are forfeitures eo instante that they are committed: as, if by special custom, upon the descent of any copyhold of inheritance, the heir is tied upon three solemn proclamations, made at three several courts, to come in and be admitted to his copyhold, if he faileth to come in, this failure is a forfeiture ipso facto. So, if a copyholder be sufficiently warned to appear, and he faileth, this is a forfeiture ipso facto. If a copyholder in the court be called and summoned to be sworn of the homage, and refuseth, this is a forfeiture ipso facto. So, if a copyholder be sworn of the homage, and then refuseth to present the articles according to his oath, this is a forfeiture ipso facto. So, if a copyholder will swear in court that he is none of the lord's copyholder, this is a forfeiture ipso facto." In *Belfield v. Adams*, 3 Bulstr. 80, 1 Roll. Rep. 256, Dodderidge, J., says,—“If a copyholder do deny his suit, this is a forfeiture;” and Croke, J., says,—“If it had been here said, *renuit* or *recusavit* to do his suit, this had been a forfeiture.” So, in *Hammond v. Wemibank*, 3 Bulstr. 268, 1 Roll. Rep. 429, Montague, C. J., says,—“The performance of services is incident to every copyholder.” Haughton, J., says,—“If a copyholder wilfully withdraws his suit and service which he owes to the lord, at his court, this is a breach of the custom, and this is a forfeiture of his copyhold estate. It is here laid, *quod sectam voluntarie et contemptuose subtrahit, et illam facere recusavit*. It is here also expressly said that the baily did give him notice *per speciale mandatum domini*.” And Croke, J., adds,—“As touching the custom to have this to be a forfeiture, in some cases it is so: a *245] copyholder holds his estate per redditus, servitia, et consuetudines, the which if he does break, and not perform the same, this shall be a forfeiture of his copyhold estate.” In *Bac. Abr. Copyhold* (L). 1, it is also laid down, that, “if a copyholder, being duly summoned, refuses to appear in court, it is a forfeiture of his copyhold; for, unless the copyholders attend, there can be no court holden.” [JERVIS, C. J.—Is the non-attendance a cause of forfeiture, in every manor?] Yes. The law is similarly laid down in *Vin. Abr. Copyhold* [O. c.]: and see *Parker v. Cook*, Style, 241. It is laid down in still more general terms in *Gilbert on Tenures*, 229, that “non-appearance at court after summons is a forfeiture of the copyhold; but, without warning, it is no forfeiture, but only negligence; and, after summons, it is a forfeiture, without an express refusal, as in case of rent; for, the consequence is more fatal in this case, because, without the copyholders’ attendance, there can be no court.” And the law is similarly laid down in the modern treatises: see *Watkin on Copyholds*, 4th edit., Vol. 1, p. 396; *Scriven on Copyholds*, 4th edit., p. 444.

The next question is, whether the forfeiture of West’s estate affects the leases granted to Donaldson and Bennett, in pursuance of the licenses of the lord. The general rule of law is, that, if a lessee holds

a term with a restriction against alienation without the consent of the lessor, an assignment of the term without such consent operates a forfeiture of the whole interest: but that, if the lessee assigns or underlets with the consent of the original lessor, and the lessee commits any act which amounts to a forfeiture, the subordinate right, though created with the sanction of the lessor, is destroyed by such forfeiture. It would be unreasonable in the extreme that a different rule should prevail in the case of copyholds: for, if the lord's remedy be *suspended during the existence of the term granted under his [*246 license, the tenant might commit any sort of forfeiture,—as, by cutting timber, or opening mines, and the like,—with impunity. [MAULE, J.—In the case of a forfeiture by the copyhold tenant, the lord would have the reversion: it may be that the lord would be entitled to seize all the beneficial interest of the forfeiting tenant.] That would be placing him in a worse position than any other landlord. The whole doctrine upon this subject rests upon one or two imperfect passages in the text-writers, which, it is submitted, are not warranted by the authorities. Scriven, p. 439, says,—“A copyholder who has leased with license may forfeit his interest in reversion or remainder, a reversioner or vested remainder-man being in the seisin equally with a tenant in possession; but such forfeiture will not affect the lease.” For this he cites *Turner v. Hodges*, Hutt. 101, 102, Litt. Rep. 233; *Gilbert's Tenures*, N. CLIII; *Whittingham's Case*, 8 Co. Rep. 45 a; *Swinerton v. Miller*, Hob. 177; and *Vin. Abr. Copyhold* [N. e], pl. 5: but all these, with the exception of *Whittingham's Case*, rest upon *Turner v. Hodges*, which is a mere obitur dictum. [WILLIAMS, J.—Does Scriven notice the analogous case of the copyholder dying without heirs after making a lease with license, as is put in *Viner*, and also in *Com. Dig. Copyhold* (K. 3)?] The act of God would not be strictly analogous to a forfeiture. [MAULE, J.—Do you find any authority the other way? Is there any instance to be found of the lord having recovered the land from the tenant by forfeiture during the continuance of a lease granted with license?] The question never appears to have arisen. [JERVIS, C. J.—It must have arisen over and over again, if the point could have been raised. The temptation is so great. The estate of the sub-tenant is created with the consent of the lord.] See the difficulty the lord is placed in by that doctrine: *there is no privity between him and the sub-tenant to enable him to maintain an action for the rent. [*247

Assuming that the leases to Donaldson and Bennett are valid, is it competent to Arden to come in and defend? He is not the landlord, but West is. He can only defend in respect of the interest that is in himself. He cannot rely on the right of the tenants. In *Doe d. Davies v. Creed*, 5 Bingh. 827 (E. C. L. R. vol. 15), 2 M. & P. 648, it was held, that, where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot

object that the occupiers have not received notice to quit from the lessors of the plaintiff,—because he is defending in respect of his own estate, not of theirs. The writ of ejectment under the 169th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, calls upon the tenant and all mankind to defend. The 171st section enacts, “that the persons *named* as defendants in such writ, or either of them, shall be allowed to appear within the time appointed.” By s. 172, “any other person not named in such writ, shall, by leave of the court or a judge, be allowed to appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.” And by s. 173, “any person appearing to defend as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord (which is what Arden is doing here); and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up, and no other.” [JERVIS, C. J.—Suppose Donaldson and Bennett had sold Arden their interest in the leases, could not Arden have defended as landlord?] No doubt he could; but it would have been in respect of a different title. [MAULE, J.—To entitle him to recover, the plaintiff must show a good title. It is *248] *enough for the defendant in ejectment to show that he is in possession by himself or by a tenant.] Where a stranger is admitted to defend in respect of a particular estate, if the plaintiff makes a good title as against that estate, he succeeds. [MAULE, J.—I do not quite concur in that general statement. Whether he has a good title or not, he may defend, if in receipt of the rents. [JERVIS, C. J.—In *Doe d. Hall v. Mouldsdale*, 16 M. & W. 689,† the defendant had not a shadow of title. CRESSWELL, J.—The authority of *Doe d. Davies v. Creed* is a very scanty one.] *Doe d. Foster v. Williams*, Cowp. 621, which was there cited, is an authority for the position now contended for. [WILLIAMS, J.—One who defends as landlord cannot set up a title which the tenant would be estopped from setting up: *Doe d. Knight v. Lady Smythe*, 4 M. & Selw. 347: but that is a totally different matter.]

JERVIS, C. J.—I am of opinion that this rule ought to be discharged. Various points were made in the course of the argument, to which it is not necessary now particularly to advert. The ground of the original application was, that the learned judge before whom the cause was tried misdirected the jury, inasmuch as he took their opinion upon an immaterial matter. I think there is no doubt that the point presented to the jury *was* immaterial to the decision of the cause. But it was agreed on by counsel,—at least, one side contended that it was a fit matter to be left; and the result of the summing up, when explained, as it seems to me, is,—“I will take your opinion upon the only disputed question of fact, viz. the reasonableness or unreasonableness of the fine; and,

if you find the fine which the lord demanded was an unreasonable one, you will find your verdict for the defendant." In effect, therefore, he tells the jury, that, upon all the undisputed facts of the case, *he is of opinion that the defendant is entitled to the verdict. [*249 And if, upon consideration, we should think, as I believe we all do, that the question submitted to the jury was an immaterial one, and should also think that my Brother Coleridge was right in telling the jury, that, upon the undisputed facts of the case, the defendant was entitled to the verdict, there will be no rule.

Now, I think, that, upon the main point, the learned judge was right in the view he took.

As the foundation for the argument upon this part of the case, I start with the assumption that the tenant upon the roll, West, was guilty of a forfeiture. It is unnecessary to express any detailed opinion upon that matter. The question then arises, whether the lord was entitled to recover. The defendant insists that he was not, because he says that he (the defendant) is entitled to set up the leases which were granted by West, the tenant upon the roll, to Donaldson and Bennett, with the concurrence of Clarke, the lord of the manor. I am of opinion, upon the authorities, that Arden is entitled to set up those leases. Indeed, it is not disputed that the authorities,—pronounced at a time when this particular branch of the law was more frequently discussed and better understood than it is at the present day,—justify him in that course. It is conceded, that, if a copyhold tenant grant a lease with the license of the lord, and the copyhold tenant dies without heirs, the lease continues a valid and subsisting lease; and yet all the difficulties which are supposed to exist in this case would exist there. And I do not see why, if the rule mentioned in the Digests be the correct rule, there should be any distinction between the failure of a copyhold tenant by the act of God, or death without heirs, and a forfeiture or disclaimer which equally leaves the lord without a tenant upon the roll. It is said that a *lease which is granted by the copyhold tenant with the concurrence of the lord, operates as a grant by the tenant and [*250 a confirmation by the lord. It is plain, as my Brother Maule says, that the intention of the parties was, that the lease should enure as a quasi enfranchisement, or as if it were an interest carved out of the freehold estate. There may, it is true, be difficulties in the way of the lord, under such circumstances, getting his rent from the sub-tenant. But it may be that the lease by the copyholder under the lord's license, enuring, as I have said before, as a lease by the copyholder and a confirmation by the lord so long as the lessor remains tenant upon the roll, on his ceasing to be such tenant the confirmation may enure as a lease from the lord, and so there would be a sufficient privity between him and the sub-tenant to enable him to recover the rent. It is, however, sufficient, in the view I take of the case, that the authorities are, as

Mr. *Bramwell* admits, all one way. That the matter must have arisen over and over again, there can be no doubt, where the temptation to take advantage of it was so strong as almost to be beyond resistance; and yet the question seems never to have been raised. From the earliest times, it seems to have been taken for granted, that, if there be a lease by a copyhold tenant, with the license of the lord, although the copyhold tenant may commit a forfeiture, the lease still remains a subsisting lease, and the lord cannot enter upon the possession of the lessee.

Then comes the next question, whether the present defendant has a right to set up that title. I think, under the circumstances, he has. He says he is the landlord. Rightly or wrongly, the tenants Donaldson and Bennett have paid him rent. Suppose they have mistaken his right, and that he has acquired the estate by wrong, he is nevertheless their landlord in fact; and he comes and puts the lord to proof of his title,—like *setting up an outstanding term carved out of the *251] copyhold estate. While that subsists, the lord cannot recover; the action is brought by the wrong person, or Donaldson and Bennett should have joined.

Upon these short and simple grounds it seems to me that my Brother Coleridge was right in telling the jury, that, if they found the question submitted to them in the negative, they must find their verdict for the defendant; and, consequently, that this rule should be discharged.

MAULE, J.—I am of the same opinion. With regard to the point first argued, viz. that the learned judge left to the jury an immaterial issue, telling them that the event of the case would turn upon whether they found that issue one way or the other,—the real state of the case was this:—There were a number of facts in evidence which might raise various points of law. Of these, two only were the subject of controversy,—one, whether there was collusion between the lord and West, the forfeiting tenant,—the other, whether or not the fine demanded by the lord was reasonable. The learned judge, without deciding whether those were material matters or not, left them to the jury; and he told them, that, if they found that the fine demanded was an unreasonable one, they must find a verdict for the defendant. If the state of facts justified a verdict for the defendant, that direction was perfectly right. I think the facts independent of those which are altogether immaterial, were quite sufficient to justify that direction.

Then, as to the leases,—It is said there was a disclaimer by West, the tenant, of the title of the lord, which amounted to a forfeiture. If that disclaimer did amount to a forfeiture, it was a forfeiture of West's interest only. Before that took place, West had, by the license of the *252] lord, granted two leases, to Donaldson and *to Bennett; and, unless West's forfeiture operated to destroy those terms, the plaintiff, the lord, had no right. Upon the authorities, it seems to me

to be abundantly clear that the terms created by those two leases under the lord's license were not forfeited by the disclaimer of West. The case put by Mr. *Bramwell*, of a lease granted out of a larger term which has been surrendered or become forfeited, is very distinguishable from the present. In that case, the sub-lease is put an end to, because it leans upon and is incident to a lease which no longer subsists. But, where a copyholder leases by license of the lord, the license operates as a grant out of the lord's freehold. By granting his license, I think the lord parts with all right to limit or impede the effect and operation of the lease granted under it. It would be contrary to justice, and also contrary to a very considerable weight of authority, if it were otherwise. Considering the antiquity of this doctrine, and its conformity with general convenience, and that there is not a shred of authority against it, I think we ought to hold ourselves bound by it. It seems to me, therefore, that the leases afford a good answer to the action, unless the defendant is precluded from setting them up.

Now, the theory and principle of a man defending as landlord, is this,—that, whereas, ordinarily, the only person who is competent to defend is the person who is in possession of the premises, the law allows one who is in by a tenant to come in and defend as if he were himself actually in possession,—not in respect of his having a right, but in respect of his being actually in possession by a tenant who acknowledges him as his landlord. Such a person has a right to say, I am in possession, and, being so in possession, he who seeks to turn me out must show a good title, or he must leave me as he finds me. *Doe d. Davies v. Creed*, 5 Bingh. 327, 2 M. & P. 648, which was referred to during the argument, was a *case where a man defend- [*253 ing as landlord sought to say that the tenancy of the occupiers of the premises, who had suffered judgment by default, had not been put an end to by a notice to quit. The answer was,—You deny the title of the landlord; you are, therefore, in the same situation as a tenant who denies the landlord's title, and who is consequently not entitled to insist on a notice to quit. The present case is a very different one from that. Here, certain leases for terms of years were duly granted. Since those leases were made, the defendant says, "I am in possession in respect of the tenants in the actual possession under those leases paying rent to me." He proves that when he comes to be let in to defend as landlord. When he comes to the trial, he is in the position of any other person who comes to defend. What is there in that that is inconsistent with *Doe d. Davies v. Creed*? There is nothing inconsistent with the defendant's being in possession by his tenants, and the leases being actually subsisting so as to bar the plaintiff's possessory right. Suppose the defendant had purchased those leases, and had let the lands to the parties now in actual possession,—what is there to prevent the leases being good and subsisting leases so as to bar the

plaintiff's right to recover in this ejectment, or to prevent the defendant from being, as he appears to be, in quasi possession by the receipt of the rent from the parties in actual possession? I see no ground afforded by what after all is only a slight dictum, for saying that this case has any resemblance to *Doe d. Davies v. Creed*. The main point there was as to the second elegit, where a moiety of the land had already been extended under a former writ; and, assuming it to have been rightly decided, it does not at all affect this case.

For these reasons, in addition to the remarks which I threw out in the *254] course of the argument, with a view *to their being answered, if they could be, by the learned counsel for the plaintiff, I concur with the Lord Chief Justice in thinking that this rule should be discharged.

CRESSWELL, J.—In coming to the conclusion that this rule should be discharged, it is not necessary to maintain that the question which the learned judge left to the jury was a material one. It was, however, a point which had been urged by counsel; and the plaintiff was in no degree prejudiced by its being left, even if it were immaterial. Nor is it necessary to decide the question raised upon the bankrupt act, whether West could commit, or whether under the circumstances he did commit, a forfeiture. I am of opinion, that, assuming that there was a forfeiture of the estate by West, the tenant on the roll, that forfeiture did not operate to avoid the leases granted under the lord's license to Donaldson and Bennett. The authorities upon that subject appear to me to be too strong to be got over.

The only remaining question is, whether the present defendant is at liberty to set up those leases. I think the case of *Doe d. Davies v. Creed* is by no means an authority for the contrary; neither is *Doe d. Foster v. Williams*, 4 B. & Ald. 196 (E. C. L. R. vol. 6), 5 J. B. Moore, 810 (E. C. L. R. vol. 16), the case upon which *Doe d. Davies v. Creed* professes or seems to be founded,—for, the particular view the court took of that point does not very clearly appear from either of the reports. There is also a case of *Doe d. Knight v. Smythe*, 4 M. & Selw. 347, where the court appear to have held, that, where a tenant has come in under a particular individual, a person in connexion with him,—I fancy they meant in collusion with him,—cannot be permitted to deny the title of the party under whom the tenant came into possession. That is taking quite a different ground; and does not at all interfere with the general rule that a party who comes in to defend as *255] *landlord, is entitled to call upon the plaintiff to prove his title. For these reasons, I am of opinion that the title of the plaintiff to recover in this ejectment failed.

WILLIAMS, J.—I am of the same opinion. The question really is, whether the plaintiff in this case is entitled to recover the copyhold premises in question by reason of the forfeiture alleged to have been com-

mitted by West, the copyhold tenant. If upon the whole case it is plain that he is not so entitled, the learned judge was quite right in telling the jury to find for the defendant, and we ought not to disturb their verdict.

Now, whether the facts proved established a case of forfeiture or not, it is not necessary to determine; and I am anxious that it should be understood that the court give no opinion at all upon that point. But, assuming that West was guilty of a forfeiture, according to the law as laid down in Comyns's Digest, title *Copyhold*, to which the attention of the learned counsel was directed in the course of the argument, the leases which were granted by the license of the lord, are not determined either by the death of the copyhold tenant, or by any act of the copyholder amounting to a forfeiture. Now, the law being so laid down by so high an authority as Lord Chief Baron Comyns, I think we ought not to hesitate to act upon it, in the absence of at least equally cogent authority the other way. Upon the authorities in Comyns, is based the notion that the lord's license to the copyhold tenant to grant a lease amounts to more than a mere dispensation or absolution from the penalty of forfeiture, and that it enures as a confirmation of the lease by him. Now, if the law be so, and the forfeiture of the copyholder's interest does not operate upon the lease, it is clear, that, if the defendant defended in this case as lessee, he would be entitled to the verdict. The only question, therefore, is, *whether it makes any difference that he defends as [*256 landlord. Now, it is not denied that the general rule is, that, in ejectment, the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's. But it is said that Doe d. Davies v. Creed has established, that, where a party defends as landlord, he must rely upon his own title, and not upon that of the tenant in actual occupation. I have always considered Doe d. Davies v. Creed to be an exceptional case. All it decides is, that, where a party defends as landlord,—the occupiers having suffered judgment by default,—he cannot object that *they* had not received a notice to quit from the lessor of the plaintiff. Assuming that to be good law, there is nothing in it to prevent the application to the present case of the general rule, which requires the plaintiff to make out his title, and which I think he has failed to do. The rule will therefore be discharged.

Rule discharged.

COCKERELL v. THE VAN DIEMEN'S LAND COMPANY

May 7.

Practice as to viva voce examination of witnesses upon summons or motion under the Common Law Procedure Act, 1854, ss. 46, 48.

THE Van Diemen's Land Company were incorporated by an act of 6 G. 4, c. 39, for the cultivation and improvement of waste lands in the

island of Van Diemen's Land. By s. 5, the shares in the company were declared to be personal estate. By s. 13, the directors were empowered to make calls. And by s. 14, it was enacted, "that, if any subscriber, or any proprietor or proprietors of any share or shares in the capital stock of the said company, his, her, or their executors, administrators, *257] successors, or assigns, shall neglect or refuse to *pay his, her, or their part or portion of the money to be called for by the directors as aforesaid, during the space of three calendar months next after the time appointed for payment thereof, together with lawful interest from the time appointed for payment, then and in every such case such person or persons so neglecting or refusing shall absolutely forfeit all his, her, or their share or shares in the capital stock of the said company, and all profits and advantages thereof, and all money theretofore advanced by him, her, or them on account thereof, to and for the use and benefit of the said company; and all shares which shall or may be so forfeited shall or may at any time or times thereafter be sold at a public sale, for the most money that can be gotten for the same, and the produce thereof shall go to and make part of the capital of the said company; but no advantage shall be taken of such forfeiture of any share or shares until after thirty days' notice shall have been given by the directors of the said company, under the hand of the clerk of the said company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode, nor unless the same shall be declared to be forfeited at some general or special general meeting of the said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen; and that every such forfeiture so to be declared shall be an absolute indemnification and discharge to and for the proprietor and proprietors, or his, her, or their executors, administrators, successors, and assigns, so forfeiting, against all actions, suits, and prosecutions for any breach of contract or other agreement between such proprietor or proprietors, his, her, or their executors, administrators, successors, and assigns, and the said company, with regard to the future carrying on and managing of the said company."

*258] *The plaintiff, who had been a shareholder and director of the company, sought to recover the value of certain shares to which he alleged that he was entitled. To this action, the defendants pleaded, amongst others, a plea setting up a forfeiture of the shares in question under the above section, for non-payment of calls.

The cause was tried before Jervis, C. J., at the sittings at Guildhall after last Hilary Term.

On the part of the defendants, it was sought to prove that the following notice, dated the 15th of May, 1852, signed by the clerk of the company, was duly served upon the plaintiff:—

"By the court of directors of the Van Diemen's Land Company.

"I hereby give you notice, that, at a general court of proprietors of the said company, held on the 31st of March, 1851, it was, amongst other things, resolved, that, in consequence of your having neglected to pay the calls on the shares standing in your name, for the space of three calendar months next after the time appointed for the payment thereof, the same shares, and all franchise and interest therein, and all the profits and advantages thereof, and all money theretofore advanced on receipt thereof, should be absolutely forfeited to and for the use and benefit of the said company; and the same were thereby declared to be forfeited accordingly, and you were thereby declared disfranchised and removed from the said company; but no advantage will be taken of such forfeiture until the expiration of thirty days from the date of this notice."

In order to prove the delivery of this notice, one Feuillade was called. He stated, that, on the 15th of May, 1852, he went to No. 8, Austin Friars, the late counting-house of the plaintiff, for the purpose of serving the notice, which was enclosed in an envelope addressed to the plaintiff; that he found the *counting-house closed (the firm [*259 having failed in the year 1847), and a board affixed to the premises, inscribed as follows:—"Letters and communications for Cockerell, Larpent, & Co., to be left at the office of J. E. Coleman, 36, Coleman Street;" that he went there, and saw Coleman, who told him the plaintiff was abroad, but that he would procure a friend of the plaintiff's to accept service of the notice.

Mr. Coleman, who was subpoenaed to produce the notice, said he had never heard of the notice; that he remembered a letter for Cockerell being left with him, but could not state exactly what he did with it, but, to the best of his recollection, he forwarded it to one Noble, who was a partner in the house of Cockerell, Larpent, & Co., and then in London; that he, Coleman, did not open communications addressed to the several partners, but gave directions for them to be forwarded to Noble; that he only opened communications addressed to the firm; and that his impression was that the notice was sent to Noble.

Noble had not been subpoenaed; and the Lord Chief Justice refused to admit secondary evidence of the notice.

A verdict was taken for the plaintiff, who distinctly swore he never saw or heard of the notice,—subject to the opinion of the court upon a special case, and without prejudice to an application on the part of the defendants for a new trial, upon affidavits.

Byles, Serjt., on a former day in this term, moved accordingly, upon affidavits stating, that the deponent, who had had the management of the defence, had no reason to believe or suspect that Noble had ever had anything to do with the shares or with the notice, or that it ever came to his hands, or the deponent would have caused him to be sub-

*260] poenaed to attend at the *trial; that he was surprised by the evidence given by Coleman; and that, after the trial, he called on Noble, and inquired of him if he ever received the notice, but that Noble declined to answer any questions except in the presence of his solicitors, who were also solicitors for the plaintiff; and that they declined to consent to Noble's being examined otherwise than in the witness-box.

This is precisely the case that is provided for by the 46th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts, that, "upon the hearing of any motion or summons, it shall be lawful for the court or judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear and be examined *vivâ voce*, either before such court or judge, or before the master, and, upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just." [WILLIAMS, J.—Does that mean, with reference to the subject of the motion? CRESSWELL, J.—Can you read Noble's evidence, or can we use it, on the rule? JERVIS, C. J.—You want to have a conversation with Noble, in order to ascertain what he will say upon another trial.] What is the defendant to do? Noble is evidently an unwilling witness: if we serve him with a subpoena duces tecum, he may decline to search for the document. [JERVIS, C. J.—If you had called upon Noble to make an affidavit, and he declined to do so, you might be in a different position.] That would be ground for a substantive motion under s. 48, which provides, that "any party to any civil action or other civil proceeding in any of the superior courts, requiring the affidavit of a person who refuses to make an affidavit, may apply by summons for an order to such person to

*261] *appear and be examined upon oath before a judge or master, to whom it may be most convenient to refer such examination, as to the matters concerning which he has refused to make an affidavit; and a judge may, if he think fit, make such order for the attendance of such person before the person therein appointed to take such examination, for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may therein impose such terms as to such examination, and the costs of the application and proceedings thereon, as he shall think just." [CRESSWELL, J.—I feel great difficulty in doing what you ask under s. 48. The object of that section seems to be, to enable the court to compel a party refusing to make an affidavit, to be examined *vivâ voce*. JERVIS, C. J.—It is somewhat analogous to a subpoena to compel evidence. In truth, you want Noble's evidence, to form the basis for this rule.] There can be no reason why this motion should not be adjourned, under s. 46, until we can procure the examination of Noble. [JERVIS,

C. J.—It may be that you want materials to enable you to make this motion: in that case, you must go to a judge at chambers for the purpose of availing yourself of this act. Or it may be that the court, *proprio vigore*, may upon the motion require further information. That would seem to be the meaning of the 46th section: but that must be when the rule comes on for *hearing*, not on moving for a rule to show cause. Suppose we grant you a rule to show cause why there should not be a new trial, and why you should not have a conversation with Mr. Noble; and suppose your rule is made absolute; you have your conversation with Noble. What then? You could not use it on the motion, and it would not be admissible on the trial! It would not be part of the rule: it would be merely an order mandatory. [CROWDER, J.—The *proper time for asking for that, will be, when cause [*262 comes to be shown against your rule.]

A rule was ultimately granted for a new trial, on the ground of surprise.

Montague Smith, on a subsequent day, showed cause.—He submitted that there was no surprise in the proper sense of the word. He referred to *Austin v. Evans*, 2 M. & G. 430 (E. C. L. R. vol. 40), and *Rearden v. Minter*, 5 M. & G. 204 (E. C. L. R. vol. 44), 6 Scott, N. R. 237; in the former of which it was held, that a party nonsuited for non-production of a document from a public office, is not entitled to a new trial on the ground of surprise, where he has served a clerk in the office with a subpoena duces tecum to produce the document, but has omitted to apply to the head of the office for permission for its production: and in the latter, in an action by A. against B. for commission due to A. as agent for B., in procuring him an apprentice, B. produced the deed of apprenticeship, under notice, and, there being an attesting witness to it who was not called, A. was nonsuited,—and it was held that A. was not entitled to a new trial on the ground of surprise, though he was not aware before the trial that there was an attesting witness,—it not appearing that he had made any inquiry on the subject. [CRESSWELL, J.—Both those were cases of nonsuit, where the plaintiff might come again. I have known a new trial granted where the plaintiff was nonsuited on the ground of a document not being stamped.]

The rule for a new trial was enlarged by consent, it being provided by the rule for the enlargement that Noble's evidence should be taken *vivâ voce* before the master.

It appeared upon Noble's examination, that the partnership of Cockerell, Larpent, & Co. was dissolved in *March, 1848; that Mr. Cockerell, after the dissolution of the firm, had a residence [*263 or place of abode at Burton Hill, and afterwards at Loughton, in Essex, until he went abroad; that Cockerell went abroad long before the office in Austin Friars was closed; that it was not until the office was closed that the board referring to Coleman was put up; that this board was

put up, as far as Noble, who was the acting partner in the liquidation of the affairs of the firm, believed, by Coleman, without communication with the partners; and that, if Coleman had forwarded the notice in question to his (Noble's) counting-house, it might have been forwarded, under his general orders to that effect, to the plaintiff's brother.

The following rule was afterwards drawn up, by consent:—

“Rule discharged,—a special case to be stated for the opinion of the court; the examination of Noble to be added to the judge's notes taken at the trial, and to be inserted in the case; the notice, and the letter accompanying the same, to be taken as read, on the ground that the originals were lost, without prejudice to any question as to the service of such notice.”

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*COOPER v. PEGG. May 5.

By an order of reference, in an action for an injury to the plaintiff's reversion by making a drain into his premises, a verdict was directed to be entered for the plaintiff, claim 500*l.*, costs 40*s.*, subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper,—the arbitrator to have all the same powers as the court or a judge sitting at Nisi Prius, and the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator.

The arbitrator by his award found all the issues in the action in favour of the plaintiff, except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages should be reduced to *one farthing*; and he further ordered the defendant to pay the plaintiff 5*l.*:—

Held, that the plaintiff was not, in the absence of a certificate under the 3 & 4 Vict. c. 24, s. 2, entitled to the costs of the cause; and, the postea having been erroneously made up with the following assessment of damages and costs,—“and the jury assess the claim of the plaintiff over and above his costs of suit to one farthing, *and for those costs to 40*s.**,”—the court allowed it to be amended, by striking out the words in italics.

Held also, that upon moving for the rule, it was not necessary for the defendant to bring before the court the order of reference, but that it was enough to show the award, which recited it; for, that, if there was anything in the order of Nisi Prius itself inconsistent with what was recited in the award, it was for the other side to show it.

THIS was an action upon the case for an injury to the plaintiff's reversion. The declaration stated, that, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, divers, to wit, two messuages and premises, with the appurtenances, were, and still are, in the possession and occupation of one Joseph Dunstan, as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff, and extending under and along the said messuages and premises, with the appurtenances, respectively, and communicating therewith, and being parcel thereof respectively, there then was, and still is, a certain drain or sewer for the drainage and conveyance of water, filth, and refuse from the said messuages and premises respectively unto and into a certain public and common drain or sewer near thereto: Yet the defendant, well knowing the premises,

but intending to injure the plaintiff in his reversionary estate and interest of and in the said messuages and premises, with the appurtenances, respectively, whilst the said messuages and premises, with the appurtenances, were so in the possession and occupation of the said tenant of the plaintiff, and the plaintiff was so interested therein as aforesaid, to wit, on, &c., *wrongfully and injuriously, and without the license and against the will of the plaintiff, caused a certain opening and entrance to be made into the said drain or sewer so extending under and along the said messuages and premises, with the appurtenances, as aforesaid, and then and on divers other days and times between the day aforesaid and the commencement of this suit, wrongfully and injuriously, and without the license and against the will of the plaintiff, caused to be diverted and carried by and through the said opening and entrance into the said drain or sewer, and under and along the said messuages and premises, with the appurtenances, respectively, divers large quantities of filth, soil, and refuse, and therewith wrongfully and injuriously caused the said drain or sewer to be filled, choked, and obstructed, and kept and continued the said opening and entrance so made, and the said drain or sewer so filled, choked, and obstructed as aforesaid, for a long space of time, to wit, thence hitherto; and by means and in consequence of the defendant so causing the said opening and entrance to be made and continued as aforesaid, and so causing to be diverted and carried by and through the same into the said drain or sewer such filth, soil, and refuse as aforesaid, and so causing the said drain or sewer to be so filled, choked, and obstructed as aforesaid, and so continuing the same filled, choked, and obstructed as aforesaid, the said drain or sewer had become and was unfit and insufficient for the drainage and conveyance of the water, filth, and refuse from the said messuages and premises as aforesaid, or either of them, and thereby the said messuages and premises, with the appurtenances, respectively, had been and were rendered foul, damp, and unwholesome, and had become and were greatly injured and deteriorated in value, and the plaintiff had been and was greatly injured and aggrieved in his said reversionary estate and *interest of and in the said messuages and premises, with the appurtenances: And the plaintiff claimed 500*l*. [*265]

The defendant pleaded,—first, not guilty,—secondly, that the reversion did not belong to the plaintiff, as alleged,—thirdly, that there was no such drain or sewer as first mentioned in the declaration,—fourthly, that the said first-mentioned drain or sewer was not such parcel as alleged,—fifthly, that the grievances complained of were, and each of them was, committed by the leave and license of the plaintiff. Issue thereon.

By an order of Nisi Prius made on the 16th of June last, it was ordered, that a verdict be entered for the plaintiff, claim 500*l*., costs 40*s*., subject to the award of a barrister, who was thereby empowered

to direct that a verdict should be entered for the plaintiff or the defendant as he should think proper, and to whom the cause and all matters in difference between the parties were thereby referred; that the arbitrator should have all the same power as the court or a judge sitting at Nisi Prius; that the arbitrator should view the premises mentioned in the declaration, and award what should be done between the said parties with reference thereto; that all other parties interested should be at liberty to become parties to the said reference; and that *the costs of the said suit, to be taxed, should abide the event of the said award, and that the costs of the reference and award, to be taxed, should be in the discretion of the arbitrator.*

On the 30th of June, the following order was made by Cresswell, J. :—

“Upon hearing the attorneys or agents for the plaintiff and the defendant, and also for John Hopper and Mary Woodhouse, the defendants in two certain actions now pending in this court at the suit of the plaintiff, and being parties interested in the subject-matter of the reference hereinafter mentioned, and also for Francis Orme and Joseph *267] Dunstan, other parties interested in *the subject-matter of the said reference, and by consent, and in pursuance of the provisions contained in a certain order of Nisi Prius made in this cause on the 16th of June instant, I do order that the said John Hopper, Mary Woodhouse, Francis Orme, and Joseph Dunstan, do become parties to the reference by the said order of Nisi Prius made to R. E. T., Esq., who shall have power to decide the issues joined in the said actions as he shall think fit,—the costs of such two last-mentioned actions to abide the event of the award of the said R. E. T., Esq. : and I do further order that the said arbitrator shall have no power to award any costs as against the said Joseph Dunstan.”

The arbitrator made his award on the 24th of November last, and, after reciting the order of reference, and that “two several actions had been brought in this court by the plaintiff against Sarah Woodhouse and John Hopper in respect of the causes of action complained of by the plaintiff in the said first-mentioned action, and the said Sarah Woodhouse and John Hopper were parties interested in the matters referred to him by the said order, and issue had been joined in the said actions respectively, and that Francis Orme and Joseph Dunstan were also parties interested in the matters so referred to him as aforesaid,” and after setting out the order of the 16th of June, he proceeded to award as follows :—

“Now, I the said R. E. T., having taken upon me the burthen of the said reference, having viewed the premises, and having examined upon oath all such witnesses as were produced before me by the said parties respectively, and having duly weighed and considered all the allegations,

proofs, and vouchers made and produced before me, do award, order, and adjudge in manner following :—

“First,—In the said action brought by W. Cooper *against W. Pegg, I do award, order, and determine the second, third, fourth, and fifth issues joined in the said action in favour of the plaintiff, Cooper; and, *as to so much of the first issue as relates to the causing a certain opening and entrance to be made by the said W. Pegg into the drain or sewer mentioned in the declaration, I award, order, and determine the same in favour of the said W. Pegg*; and, as to the residue of the said first issue, I do award, order, and determine the same in favour of the said W. Cooper: And I do award, order, and determine that the verdict entered up for the plaintiff shall stand, but that the damages be reduced to the sum of *one farthing* : [268]

“Secondly,—In the action brought by the said W. Cooper against Mary Woodhouse, I do find each of the issues joined in the said action in favour of the said W. Cooper; and I do award, order, and determine that the said Mary Woodhouse do pay to the said W. Cooper the sum of 10*l.* at the time and place hereinafter mentioned :

“Thirdly,—In the said action brought by the said W. Cooper against the said John Hopper, I do find each of the issues joined in the said action in favour of the said W. Cooper; and I do award, order, and determine that the said John Hopper do pay to the said W. Cooper the sum of 10*l.* at the time and place hereinafter mentioned :

“Fourthly,—I do award, order, and determine that the said Francis Orme do pay to the said W. Cooper the sum of 15*l.*, and the said W. Pegg do pay to the plaintiff the sum of 5*l.*, at the time and place hereinafter mentioned :

“Fifthly,—I do award, order, and determine that the said W. Cooper do and shall, at his own costs and expenses, and with all speed and despatch, substitute a nine-inch drain for and in lieu of the four-inch drain *which now runs from the six-inch drain made by the said W. Cooper into the common sewer in front of the house occupied by the said Joseph Dunstan as tenant to the said W. Cooper, and do also substitute an elbow-pipe at the point opposite the cottage occupied by Sarah Todd, for and in lieu of the man-hole by means of which the drainage of the said cottage now runs into the said six-inch drain of the plaintiff: And I do award, order, and determine that neither the said W. Cooper by himself or by his tenants of the said premises now occupied by the said Joseph Dunstan and Sarah Todd, or by any other person, nor the said Joseph Dunstan, do or shall in any way interfere with the drain made in the garden of the said Mary Woodhouse, and communicating with the said drain of the plaintiff, or do anything to cut off the said communication, or to prevent the drainage from the houses numbered 9, 10, 11, and 12, in Coburg Place, Bayswater, running through and along the said drain in the garden of the house No. 9, being [269]

the house occupied by the said Mary Woodhouse, into the said drain of the plaintiff, and from thence into the common sewer: And I do award and order that the said Joseph Dunstan do and shall allow the said W. Cooper and his workmen the free use and entrance into the premises occupied by him as the tenant of the said W. Cooper, for the purpose of making the said nine-inch drain, and substituting the said elbow-pipe: And I do award, order, and determine that the said sums of 10*l.*, 15*l.*, 10*l.*, and 5*l.*, be paid respectively by the said Mary Woodhouse, Francis Orme, and John Hopper, and William Pegg, on, &c., at, &c.: And I do further award, order, and determine that the said W. Cooper do bear and sustain his own costs and the costs of the said Joseph Dunstan incurred by them in and about this reference; and that the said William Pegg, Mary Woodhouse, and Francis Orme, and John Hopper, *270] do respectively bear and sustain *each of them their own costs incurred in and about this reference; and that the said William Pegg do pay one-fifth, the said Mary Woodhouse one-fifth, the said John Hopper one-fifth, and the said Francis Orme two-fifths of the costs of this my award:

"And lastly, I do award, order, and determine, that, save as above awarded, the said several parties have no cause of action, right, or claim against each other in respect of the matters referred to me as aforesaid."

The *postea* in the case of *Cooper v. Pegg* was made up in conformity with the finding of the arbitrator upon the several issues; but it concluded thus,—“And they (the jury) assess the claim of the plaintiff, *over and above his costs of suit*, to one farthing, and for those costs to 40*s.*”

Ogle, in Michaelmas Term last,—the order of reference having been made a rule of court, but the master having stayed the taxation of the plaintiff's costs of the action, for the opinion of the court, as to whether the plaintiff was entitled to costs, he having recovered *by the verdict* only one farthing, and the arbitrator not having certified under the 3 & 4 Vict. c. 24, s. 2,—obtained a rule to show cause why the *postea* should not be amended by striking out the words “and for those costs to forty shillings.”

*271] *Channell*, Serjt., and *Baddeley*, now showed cause. (a)—*Three causes in effect are referred, and two other persons, Orme and

(a) *Channell*, Serjt., took a preliminary objection, viz. that the rule was drawn up upon insufficient materials, being drawn up, not upon the order of reference itself, or upon the rule of court, but upon an affidavit having a copy of the *postea* annexed thereto and the award referred to therein as an exhibit. He submitted, that, though the award recited, that, by a certain order of reference, it was ordered so and so, it did not follow that the whole order of reference was before the court.

Byles, Serjt., contra, insisted that the order of reference was sufficiently brought before the court by the recital thereof in the award; and that, if there was any part of the order which had the effect of qualifying or controlling that part which was so recited, it lay upon the defendant to show it.

CRESSWELL, J.—If the award annexed to or exhibited in the affidavit on which the rule was

Dunstan, are allowed to come in as parties to the reference. By his award as to the action of *Cooper v. Pegg*, the arbitrator has found all the issues except the first in favour of the plaintiff, and the first issue he has found partly for the plaintiff and partly for the defendant; and he has directed that the verdict entered for the plaintiff shall stand, but that the damages shall be reduced to one farthing; and he has further awarded that the defendant shall pay to the plaintiff the sum of 5*l.* By the award, therefore,—and the costs of the suit are directed by the order to abide the event of the award,—the plaintiff recovers 5*l.* 0*s.* 0½*d.* The plaintiff could not have succeeded at all without showing some injury to his reversion. This is not within Lord Denman's Act, 3 & 4 Vict. c. 24, s. 2, which only applies to cases in which the plaintiff recovers *by the verdict of a jury* less damages than 40*s.*, and there is no certificate. This is not the finding of a jury. In *Griffiths v. Thomas*, 4 D. & L. 109, after issue joined in an action on the case for diverting a watercourse, “all matters in difference in the cause” were referred by a judge's order to arbitration, “the costs of the said suit to abide *the event* of the award;” but no power was given to the arbitrator to certify under the 3 & 4 Vict. c. 24, s. 2. The arbitrator having found for *the plaintiff on all the issues, and assessed his damages at 6*d.*,—it was held that the master properly allowed [*272 the plaintiff the full costs. Coleridge, J., after taking time to consider, said: “It is plain that the statute of 3 & 4 Vict. c. 24, s. 2, does not apply in terms, for, the plaintiff does not recover his 6*d.* by the verdict of a jury. But it was contended, and I think properly, that the true question turns on the meaning of the submission. It was said, that, as the parties must be taken to have contemplated the bringing themselves within the statute of Gloucester (6 Ed. 1, c. 1), so must they also within the recent statute above mentioned, and then, by its operation, the costs were taken away. There is some difficulty, however, in supposing this, when the action was clearly brought, not for real damages, but to try a right, and yet no power was given to the arbitrator to certify to that effect. It seems to me that the true meaning of the submission is what its words import, that costs, *i. e.* the payment of costs, should follow the event, *i. e.* the legal event of the award,—that he in whose favour the decision was, should be paid by the other party the costs of the suit.” [CRESSWELL, J.—There was no verdict in that case: here there is. Would you extend this statute to the case of a certificate? Suppose an arbitrator, with power to alter the verdict by a certificate, directs the verdict to be reduced from 500*l.* to a farthing,—what would the plaintiff in that case recover by the verdict of

moved sets out enough of the order of reference to show that the arbitrator was authorized to make the award, it is for the other side to show that there is something in the order that is not set out which varies its effect.

Per Curiam.—Objection overruled.

a jury?] Doubtless, one farthing only would be the sum recovered, but that would be by the certificate. [CRESSWELL, J.—He would not have a judgment on the certificate.] The object of the statute was, to prevent frivolous actions. This is in substance an action to try a right. [JERVIS, C. J.—There is nothing in the point at all. You have recovered one farthing. No certificate; no costs.] The legal event of the *273] award is in favour of the plaintiff; *and the arbitrator has given the plaintiff 5*l.*, which, whatever he may choose to call it, is damages. We are, therefore, strictly within the letter as well as the meaning of the statute.

Byles, Serjt., and *Ogle*, were not called upon.

JERVIS, C. J.—I am of opinion that this rule must be made absolute. The case seems to me to be a perfectly plain one. The cause is referred, a verdict being entered for the plaintiff, damages 500*l.*, costs 40*s.*, the arbitrator to have power to direct that a verdict should be entered for the plaintiff or the defendant as he should think proper, and the reference being of the cause and all matters in difference between the parties, the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. Two other causes are afterwards brought in, and two other persons allowed to come in as parties to the reference, under a judge's order: so that, in the result, the reference is of three causes and the matters in difference between the parties thereto, and also of the matters in difference between the plaintiff and those two other persons. In making his award in this cause, the arbitrator chooses to determine the issues separately; and the result is, that substantially the defendant succeeds; for, the arbitrator awards the plaintiff *one farthing* damages, and no more. Mr. *Baddeley*, however, says, that, because the arbitrator has in another part of his award directed that the defendant shall pay the plaintiff 5*l.*, the plaintiff has by the award recovered 5*l.* 0*s.* 0½*d.*, and that, as the costs of the suit are to abide the event of the award, therefore the plaintiff, having recovered more than 40*s.*, is entitled to the costs. But the 5*l.* are not given as damages in the cause. The plaintiff recovers by the verdict one farthing, and no more. *Then, *274] whatever the agreement between the parties, the defendant is entitled to have the *postea* made up according to the finding. Whether or not the plaintiff can tax his costs on the *award*, I will not say. He might on the *postea*, unless it be altered. By Lord Denman's Act, 3 & 4 Vict. c. 24, s. 2, having recovered by the verdict of a jury, or by that power which is substituted for the jury, less than 40*s.*, the plaintiff is not entitled to costs, in the absence of a certificate that the action was really brought to try a right. When the master sees the finding properly entered on the *postea*, he will give no costs. Mr. *Baddeley* cites a case of *Griffiths v. Thomas*, 4 D. & L. 109, to show that this case is not within Lord Denman's Act. But there, the reference took

place before the cause was at issue. Here, the reference is to an arbitrator in substitution for a jury. The plaintiff has recovered, if at all, one farthing by the verdict of a jury,—by the direction of an arbitrator on behalf of the jury. The assessment of 40*s.* costs would be error, without a certificate. The defendant is entitled to have the *postea* set right.

CRESSWELL, J.—I am also of opinion that the defendant is entitled to have the *postea* altered as prayed, the case falling within Lord Denman's Act, the 2d section of which enacts, "that, if the plaintiff, in any action of trespass, &c., shall recover by the verdict of a jury less damages than 40*s.*, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, *any costs whatever*, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance in respect of which the action was brought, *or that the trespass or grievance in respect of which the action was brought was wilful and malicious." Here, a verdict is taken [*275 and entered for the plaintiff, for 500*l.* and costs, and it is agreed that the arbitrator to whom the cause and the matters in difference were referred, shall have power to alter the verdict by certificate or award. He has done so: he has altered the verdict to one farthing. It still, however, remains the verdict of the jury, and the judgment follows. The case is clearly within Lord Denman's Act. The parties themselves seem to have been of that opinion; for, they provide that the arbitrator shall have the same power to certify that the judge at *Nisi Prius* would have. Here, then, is a verdict for the plaintiff for one farthing, and no certificate. There is therefore an end of the matter. The *postea* must be entered up according to the legal effect of the finding. A question may hereafter arise as to the costs upon the finding of the arbitrator; but we have nothing to do with that now.

WILLIAMS, J.—The record is clearly wrong. The jury found a verdict for the plaintiff, for 500*l.* By agreement of the parties, the cause is referred, with power to the arbitrator to direct how and for what amount the verdict shall stand. The arbitrator having directed a verdict to be entered for the plaintiff with one farthing damages, it is the same as if it had been so originally found by the jury. The case falls within the plain terms of Lord Denman's Act. The plaintiff has recovered by the verdict of a jury one farthing, and no more: there is no certificate; and consequently he is clearly entitled to no costs.

CROWDER, J.—I also am of opinion that this rule must be made absolute. The defendant is clearly entitled to have the *postea* amended, to make it consistent *with the finding. The plaintiff has recovered by the verdict of a jury one farthing. Where a cause is [*276

referred, and a verdict taken in this way, the act of the arbitrator in dealing with the verdict, is the act of the jury. As to the other matter, I give no opinion. The peculiarity of this case is, that, by the order of reference, the costs of the suit are to abide the event of the *award*.

Rule absolute.(a)

(a) See *Perry v. Dunn*, 12 Law Journ. N. S., K. B., 351. There, an action having been brought to try a right, was referred by an order of reference which contained a clause that the arbitrator was to have all the powers to certify that a judge would have had, and also that the court might, if they thought fit, send the award back to be amended. The arbitrator having found for the plaintiff, with one farthing damages, but having refused to certify under the 3 & 4 Vict. c. 24, s. 2, that the action was really brought to try a right,—the court refused to send back the award to be amended in this respect.

END OF EASTER TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
EXCHEQUER CHAMBER,
IN
Trinity Term,

IN THE
EIGHTEENTH YEAR OF THE REIGN OF VICTORIA. 1855.

The Judges who usually sat in Banc in this Term were:—

JERVIS, C. J.
MAULE, J.

CRESSWELL, J.
CROWDER, J.

ABBOT and Another *v.* ROGERS, sued with Others. *June 8.*

The 24th section of the 7 & 8 Vict. c. 110, which imposes a penalty upon the promoters of an intended company for entering into contracts for and in the name of the intended company before obtaining a certificate of provisional registration,—and the 7th section of the 10 & 11 Vict. c. 78 (an act to amend the former), which imposes a penalty upon the promoters for issuing before complete registration, any prospectus, &c., containing statements at variance with the particulars returned to the registrar of joint-stock companies under the former act,—are both applicable to railway companies requiring an act of parliament.

THIS was an action for money payable by the defendants to the plaintiffs for work done in and about and relating to certain proceedings in and before parliament and otherwise, and materials for the same provided; and for journeys made and taken in and about that work by the plaintiffs for the defendants, upon their retainer, and at their request, and for fees due and payable to the plaintiffs in respect thereof; and for money paid by the plaintiffs for the use of the *defendants at their request; and for money found to be due from the defendants to the plaintiffs upon accounts stated between them. [*278]

The defendant Rogers pleaded,—first, that, after the passing of the act of parliament which was passed in the session of parliament holden in the seventh and eighth years of the reign of the now Queen, intituled “An act for the registration, incorporation, and regulation of joint-stock companies,” the defendants were about to form and establish, and were forming and establishing, in part of the united kingdom of Great Britain and Ireland other than Scotland, a company for the purpose of profit, the same being a company for executing works, viz. docks and a railway, which could not be carried into execution without obtaining the authority of parliament, and not being a banking company, a school, or a scientific or literary institution, or a friendly society, loan society, or a benefit building society, certified and enrolled under any statute or statutes, but being a partnership the capital whereof was intended and agreed to be divided into shares, and so as to be transferable without the express consent of all the partners: That the formation of the said company commenced after the 1st of November, 1844, and that the said company was in all respects a company requiring provisional registration according to the said act: That, while they the defendants were promoters of the said intended company, and were acting in the formation thereof, and *before the promoters* thereof, or any of them, or any person or persons, *had obtained a certificate of provisional registration* relating to the said company, and before the same was provisionally registered under the said act, and after the passing of the said act, and after the said 1st of November, the said work was done and the said materials were provided, and the said journeys were made and taken, *279] and the said money was *paid, not in or about or for the purpose of obtaining such provisional registration, but otherwise in and about and for the purpose of constituting the said company, and obtaining an act of parliament for the establishment and incorporation thereof, and under and in pursuance and execution of divers contracts made after the said 1st of November by and between the plaintiffs and the defendants, as and being such promoters as aforesaid, on behalf of the said intended company, contrary to the form of the statute in such case made and provided,—of all which the plaintiffs, before and at the time of the doing the said work, the providing the said materials, the making and taking of the said journeys, and the paying of the said money, had knowledge and notice; and that the said accounts were stated of and concerning the claim of the plaintiffs in respect of the premises, and not of and concerning any other money whatever.

To this plea the plaintiffs demurred, the ground of demurrer stated in the margin being as follows:—“The matter of law intended to be argued in support of this demurrer (amongst others) is, that it appears upon the face of the plea that the company was one for executing works which could not be carried into execution without obtaining the authority of parliament, and that it therefore appears that it was one

which did not require to be completely registered; and that there is nothing in the statute in the plea mentioned which requires the promoters of such a company, or any other person, to return various particulars which in and by the act are directed to be returned; and that the statute does not under the circumstances disclosed by the plea, prevent the recovery of the attorney's bill against the promoters, who, if anybody, are in fault."

Second plea,—that, after the passing of the act of parliament which was passed in the session of parliament *holden in the tenth and eleventh years of the reign of the now Queen, intituled "An [*280 act to amend an act for the registration, incorporation, and regulation of joint-stock companies," the defendants were about to form and establish, and were forming and establishing, in part of the united kingdom of Great Britain and Ireland other than Scotland, a company for a purpose of profit, the same being a company for executing works, viz. docks and a railway, which could not be carried into execution without obtaining the authority of parliament, and not being a banking company or school, or a scientific or literary institution, or a friendly society, loan society, or benefit building society, certified and enrolled under any statute or statutes, but being a partnership the capital whereof was intended and agreed to be divided into shares, and so as to be transferable without the express consent of all the partners, the formation of which company commenced after the 1st of November, 1844, and which company was in all respects a company requiring provisional registration according to the secondly mentioned act: That, while the defendants were so about to form and were forming and establishing the said company as aforesaid, and before the said company had obtained a certificate of complete registration under the secondly mentioned act, or been incorporated by act of parliament, charter, or otherwise, the said work was done and the said materials were provided, and the said journeys were made and taken, and the said money was paid, in and about the issuing, publishing, and addressing to the public, and to divers persons, divers prospectuses, circulars, hand-bills, and advertisements containing statements of divers particulars relating to the said company, which by the first-mentioned act were directed to be returned to the registrar of joint-stock companies, and of divers particulars relating to the said company which by the secondly-mentioned act were directed to *be returned to such registrar, before any of such particulars had [*281 been so returned, against the form of the statute in such case made and provided,—of all which the plaintiffs, before and at the time of the doing of the said work, the providing of the said materials, the making and taking of the said journeys, and the paying of the said money, had knowledge and notice; and that the said accounts were stated of and concerning the claim of the plaintiffs in respect of the

said work done, materials provided, journeys made and taken, and moneys paid, and of and concerning no other money whatever.

To this plea also the plaintiffs demurred, the ground of demurrer stated in the margin being as follows:—"The matter of law intended to be argued in support of this demurrer (amongst others) is, that the company appears upon the plea to be one for executing works which could not be carried into execution without obtaining the authority of parliament, and, therefore that there is nothing in the statute which prohibits the defendants from entering into contracts for or to pay for the work, materials, journeys, and money paid, which for anything that appears in the plea might have been necessary to obtain an act of parliament; and also that the Joint-Stock Companies Registration Act does not prohibit the recovery from promoters in parliament of a bill to incorporate such a company, of the attorney's bill against the promoters, who, if anybody, are in fault."

*282] *V. Harcourt*, in support of the demurrers.(a)—The *first plea is founded upon the 24th section of the act for the registration, incorporation, and regulation of joint-stock companies, 7 & 8 Vict. c. 110, which enacts, "that, if, before a certificate of provisional registration shall be obtained, the promoters, or any of them, or any person employed by or under them, take any moneys in consideration of the allotment either of shares or of any interest in the concern, or by way of deposit for shares to be granted or allotted; or issue, in the name or on behalf of the company, any note or scrip, or letter of allotment, or other instrument or writing to denote a right or claim, or preference or promise, absolute or conditional, to any shares: or advertise the existence or proposed formation of the company; or make any contract whatsoever for or in the name or on behalf of such intended company; then every such person shall be liable to forfeit for every such offence a sum not exceeding 25*l.*; and that it shall be lawful for any person to sue for and recover the same by action of debt." The question is, whether that applies to railway companies, which cannot be carried on without the aid of an act of parliament. It was held in *Young v. Smith*, 15 M. & W. 121,† 4 Railw. Cas. 135, that the 26th section, which prohibits the sale of shares before *complete* registration, in any joint-stock company formed after the 1st of November, 1844, does *not* apply to these companies; and there can be no good reason why the 24th section should not receive the same construction. Alderson, B., there lays down the true rule of construction, which is just as applicable to the 24th section as to the 26th. He says: "The first question is, what is

(a) The points marked for argument on the part of the plaintiffs, were,—“That the pleas of the defendant Rogers do not sufficiently show any illegality in the plaintiffs' claim; that the first plea admits the propriety of the plaintiffs' claim, and does not show any facts bringing that claim within the prohibitory or penal clauses of the 7 & 8 Vict. c. 110; and that the second plea does not sufficiently show that the illegality, if any, of the acts therein alleged, is properly chargeable to the plaintiffs.”

the meaning of the words 'joint-stock company' as used in the 26th section? *Primâ facie* they must be taken to include any joint-stock company of the nature intended to be legislated for in the act, for, the words are 'any joint-stock company.' Now, we must look at the interpretation clause to discover the intention of the legislature in *using those words: and this will be found in the 2d section, [*283 which describes what the words 'any joint-stock company' mean in the statute generally; that is to say, 'any partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all parties:' they also include 'every assurance company for the purpose of assurance on lives, or against any contingency involving human life, against the risk of loss or damage by fire, or by storm or other casualty, or against risk of loss or damage to ships at sea or on voyages, or to their cargoes, or for granting or for purchasing annuities on lives,' &c. The section further includes 'every partnership which at the formation, or by subsequent admission (except an admission consequent on devolution or other act in law), shall consist of more than thirty-five members.' Those are the classes of joint-stock companies to which the statute *primâ facie* applies, according to the interpretation clause; but that clause contains a proviso that the act shall *not* extend to 'any company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterworks, navigation, tunnel, archway, *railway*, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of parliament.' Therefore, the whole conclusion on this point to be drawn from the 2d section, is, that the statute applies to all joint-stock companies, except railway companies (with some others mentioned) when they require the assistance of parliament, and to them when specially provided for in the present act. That is the true construction of the interpretation clause, which raises the only real difficulty in this case. How, then, are we to interpret the words 'joint-stock company,' as used in the 26th section? We must, unless railway companies are specially mentioned in that clause, read joint-stock companies as meaning joint-stock companies such as are defined to *be within the meaning [*284 of those words in the 2d section, and which have obtained complete registration under the act, and which the legislature says in this section shall not transfer their shares until such complete registration. It is clear, therefore, that this railway company is not within the expression 'joint-stock company' in this section, seeing that it is a company for executing a railway, and is not specially mentioned in the clause, and therefore not within the act." This decision was confirmed in *Lawton v. Hickman*, 9 Q. B. 563, 586 (E. C. L. R. vol. 58). In both cases the 26th section is held not to include railway companies, though they are or may be included in the 25th section. By the same analogy, the penalties imposed by s. 24 cannot apply to railway com-

panies, though such companies are included in the 23d section. The 4th section enacts, "that, before proceeding to make public, whether by way of prospectus, handbill, or advertisement, any intention or proposal to form any company for any purpose within the meaning of this act, whether for executing any such work as aforesaid under the authority of parliament, or for any other purpose, it shall be the duty of the promoters of such company, and they or some of them are thereby required, to make to the office thereby provided for the registration of joint-stock companies, returns of the following particulars, that is to say,—1. The proposed name of the intended company; and also, 2. The business or purpose of the company; and also, 3. The names of its promoters, together with their respective occupations, places of business (if any), and places of residence, &c. &c. And that, upon such registration of at the least the three particulars first before mentioned, the promoters of such company shall be entitled to a certificate of provisional registration." [CRESSWELL, J.—The three particulars first mentioned are to be registered. The registration precedes the certificate.] As *to the 5th section,—which enacts, "that, if for a period of one month after the particulars thereby required to be registered, or any of them, shall have been ascertained or determined, the promoters of any company fail to register such particulars, then, on conviction thereof, any promoter as aforesaid shall be liable to forfeit for every such offence a sum not exceeding 20l.,"—the same rule of construction must apply as in *Young v. Smith*. [CRESSWELL, J.—Does not s. 5 apply to everything that is mentioned in the 4th section?] The same argument was urged as to ss. 25 and 26. Assuming that this company was one which ought to have been provisionally registered, there is no sufficient averment in the plea that the acts done by them were illegal per se; the illegality, if any, must arise out of s. 24. It is consistent with the statements in the plea, that the contracts were made by the promoters personally. What is the reason why a contract for the doing a thing which is prohibited under a penalty cannot be enforced? It is because both the parties who enter into it do so intending to violate the law. (a) There is no averment here that the plaintiffs had notice of the state of things out of which the alleged illegality arises, at the time the contract to do the work was made, or at the time the liability to pay the money was incurred; but only at the time of the doing of the work, and the payment of money.

The second plea, which is founded on the 10 & 11 Vict. c. 78, s. 7, (b)

(a) See the cases cited in *Feret v. Hill*, 15 C. B. 207 (E. C. L. R. vol. 80).

(b) Which enacts, "that it shall not be lawful for the promoters of any company, or for any person connected with any company, at any time before such company has obtained a certificate of complete registration under the said recited act, to issue or publish or in any manner address or cause or suffer to be addressed to the public, or to the subscribers or others, any prospectus or circular, handbill or advertisement, or other such document relative to the formation or modification of the company, containing any statement at variance with the particulars which may have been returned to the registrar of joint-stock companies under the said recited act or this

is open to the same objection : a *railway company, requiring an act of parliament, not needing complete registration. [*286

Montague Smith (with whom was *Chandler*), *contra*.(a)—The distinction between provisional and complete registration is expressly taken in *Young v. Smith*, where Alderson, B., says: "I do not think that a company of this nature was intended to be included in the 26th section; for, I should conjecture from the statute that the intention of the legislature was, to make certain provisions for railway companies and others, until the 25th section, in which it is finally provided that railway companies, &c., having obtained the authority of an act of parliament, shall be bound by that; and, after that section, the legislature proceeds to make regulations for the transfer of shares of joint-stock companies of a different description; for, in all the clauses of the statute subsequent to the 25th, there is no reference made to railway or other companies which are *excepted out of the interpretation clause. I therefore think that the object of the legislature was, to make certain [*287 general provisions down to the 25th section, and thenceforth further special provisions for the companies not specially provided for before. The 26th section, therefore, does not apply to a railway company, which requires the authority of an act of parliament, and has not got one; and this plea is consequently bad, inasmuch as the contract between the parties was for the transfer of shares in a railway company which was excepted from the operation of the act." That distinction is a perfectly sound one. It is said that the 4th section does not in terms require a railway company to be registered: but, taking the 4th and 5th sections together, it is quite manifest that it does. There are various clauses in the act referring to prior clauses in which railway companies are named. The 24th section in terms refers to the 23d, pointing out what shall be the consequence of the doing of that which is thereby prohibited. Then, it is said that the acts alleged to be done here are not shown to be such as the company are prohibited from doing. But the plea alleges that the work was done and the money paid in and about and for the purpose of constituting the company, and obtaining an act of parliament for the establishment and incorporation thereof, and under and in pursuance and execution of divers contracts made after the 1st of November, 1844, by and between the plaintiffs and the defendants, as and being such promoters as aforesaid, on behalf of the said

act, nor to issue, publish, or in any manner address or cause and suffer to be addressed to the public, or to the subscribers or others, any such prospectus, circular, handbill, or advertisement containing any statement of particulars which are by the said recited act or by this act directed to be returned to the registrar of joint-stock companies, until such particulars have been so returned; and, if any prospectus or circular, handbill or advertisement be issued, published, or addressed to the public, or to the subscribers or others, contrary hereto, any promoter of the company shall be liable for each and every such issue or publication to forfeit any sum not exceeding 20*l*."

(a) The point marked for argument on the part of the defendant Rogers, was,—“That the pleas are respectively good, and show sufficient illegality under the statutes 7 & 8 Vict. c. 110, and 10 & 11 Vict. c. 78, to invalidate the plaintiffs' claim.”

intended company, contrary to the form of the statute. [CRESSWELL, J.—I doubt whether the contract is shown to profess to bind the company.] The contract and all that is done under it are shown to be contrary to the statute, and the plaintiffs are parties to the illegal contract. No remedy lies upon it. There are no degrees of criminality. The law *288] is clearly and distinctly stated *by Parke, B., in delivering the judgment of the court in *Cope v. Rowlands*, 2 M. & W. 157.† “It is perfectly settled,” he says, “that, where the contract which the plaintiff seeks to enforce, be it express or implied, is, expressly or by implication, forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear, that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: per Lord Holt, *Bartlett v. Viner*, Carth. 252, Skinn. 322. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The only question is, whether the statute means to prohibit the contract.” Here, the object is, to protect the public against frauds. [WILLIAMS, J.—Is there any case which has held that a party is prevented from suing upon a contract, unless he is the party interdicted?] In *Langton v. Hughes*, 1 M. & Selw. 593, Lord Ellenborough says,—“Without multiplying instances, it may be taken as a received rule of law, that what is done in contravention of the provisions of an act of parliament, cannot be made the subject-matter of an action.” [WILLIAMS, J.—That case is open to the remark I have just made: the plaintiff was seeking to recover the price of drugs sold by him to a brewer, knowing that they were to be used in the brewery, contrary to the statute. Sir James Mansfield takes the distinction in *Hodgson v. Temple*, 5 Taunt. 181 (E. C. L. R. vol. 1), where he says,—“The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but, to effect that, it is necessary that the vendor should be a sharer in the illegal transaction.”] A man who is *289] doing work which he knows to be prohibited by a statute, is clearly aiding a breach of the law. [CRESSWELL, J.—Here, the penalty is imposed only upon one side; but, in the cases you cite, both parties were liable.] In *Ribbans v. Crickett*, 1 B. & P. 264, an innkeeper was held to be disentitled to recover from a candidate in respect of provisions furnished at his request to voters, on the ground that the candidate was prohibited by the 7 & 8 W. 3, c. 4, from furnishing provisions to voters. And Byre, C. J., said: “The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the legislature, as appears by the preamble of the act: how, then, can we enforce a contract to do that very thing which is so much reprobated by the act?” [CROWDER, J., re-

ferred to *The Gas-Light and Coke Company v. Turner*, 7 Scott, 779, 5 N. C. 666 (E. C. L. R. vol. 35), and (in error) 6 N. C. 824 (E. C. L. R. vol. 37), 8 Scott, 609, cited in *Feret v. Hill*, 15 C. B. 211 (E. C. L. R. vol. 80).] In *Bull v. Chapman*, 8 Exch. 444,† it was held, that the 23d section of the 7 & 8 Vict. c. 110, absolutely prohibits the promoters of any joint-stock company from making calls, from purchasing, contracting for, or holding land, or from entering into contracts for any services, or for the execution of any works, &c., except such services, &c., are necessarily required for the establishing of a company, and except the contract or purchase be made conditional on the completion of the company, and to take effect after the certificate of complete registration, &c.; and that such contracts so prohibited are illegal.

The second plea is founded upon the 10 & 11 Vict. c. 78, s. 7. [JERVIS, C. J.—You need not trouble yourself on that.]

Harcourt, in reply.—In *Bull v. Chapman*, the action was after provisional and before complete registration: the plea showed that the plaintiffs were the promoters *of one company, and the defendants of another, and that both did acts that are declared illegal by the 23d section of the act; and there was a distinct averment, which is wanting here, that the plaintiffs had notice of all the premises at the time of the making of the contract and promise. Mere knowledge of illegality on the part of the defendant, the plaintiff being no participator in it, will not affect the plaintiff's remedy: *Holman v. Johnson*, Cowp. 341. [WILLIAMS, J.—Heath, J., in *Hodgson v. Temple*, 5 Taunt. 181 (E. C. L. R. vol. 1), expressly draws the distinction between *Holman v. Johnson* and *Biggs v. Lawrence*, 8 T. R. 454.] Having incurred the liability to do the work, is it illegal for the plaintiff to perform his contract, because he afterwards has notice that it is within the prohibition of a statute? [WILLIAMS, J.—You will have some difficulty in establishing that a man can be entitled to recover compensation for work done by him after he has notice of its illegality, because he had contracted in ignorance to do it.] None of the penal clauses in the statute apply to railway companies. [WILLIAMS, J.—The 23d section clearly applies here.] But not the 24th. Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court:—

This was an action for work and labour in and about and relating to certain proceedings in and before parliament and otherwise, and materials for the same provided, and for journeys made in and about that work, by the plaintiffs for the defendants, on their retainer, and at their request; and for fees due and payable to the plaintiffs in respect thereof; and for money paid by the plaintiffs to the use of the defendants, at their request; and for money found due upon accounts stated between the plaintiffs and the defendants.

*The first plea, which was founded upon the 7 & 8 Vict. c. 110, ss. 23, 24, stated, that, after the passing of that act, the

defendants were about to form and establish, and were forming and establishing, in, &c., a company for the purpose of profit, the same being a company for executing works, viz. docks and a railway, which could not be carried into execution without obtaining the authority of parliament, and not being a banking-company, &c., but being a partnership the capital whereof was intended and agreed to be divided into shares, and so as to be transferable without the express consent of all the partners; that the formation of the said company commenced after the 1st of November, 1844, and that the said company was in all respects a company requiring provisional registration according to the said act; that, while the defendants were promoters of the said intended company, and were acting in the formation thereof, and before the promoters thereof, or any of them, or any person or persons, had obtained a certificate of provisional registration relating to the said company, and before the same was provisionally registered under the said act, and after the passing of the said act, and after the said 1st of November, the said work was done, &c., &c., not in or about or for the purpose of obtaining such provisional registration, but otherwise in and about and for the purpose of constituting the said company, and obtaining an act of parliament for the establishment and incorporation thereof, and under and in pursuance and execution of divers contracts made, after the said 1st of November, by and between the plaintiffs and the defendants, as and being such promoters as aforesaid, on behalf of the said intended company, contrary to the form of the statute in such case made and provided,—of all which the plaintiffs, before and at the time of the doing the said work, &c., had knowledge and notice.

*292] The second was a similar plea founded upon the *statute 10 & 11 Vict. c. 78, s. 7; and to both there were demurrers and joinders.

The argument in support of the demurrer to the first plea was founded on the decision of the Court of Exchequer in *Young v. Smith*, 15 M. & W. 121,† in which it was held that the 26th section of the 7 & 8 Vict. c. 110, which prohibits, before complete registration, the sale of shares in any joint-stock company formed after the 1st of November, 1844, does not apply to railway companies requiring an act of parliament. The course of reasoning by which the court arrived at that conclusion, appears to have been as follows:—By the 7 & 8 Vict. c. 110, s. 26, it was enacted (inter alia), “with regard to subscribers and every person entitled or claiming to be entitled to any share in *any joint-stock company* the formation of which shall be commenced after the 1st day of November, 1844, that, until such joint-stock company shall have obtained a certificate of complete registration, &c., it shall not be lawful for any such person to dispose by sale or mortgage of such share, or of any interest therein,” &c.

To ascertain the meaning of the words “any joint-stock company,”

the 2d section was referred to, by which it was enacted that "the term 'joint-stock company' shall comprehend every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners, also every assurance company," &c., &c.: "Provided, nevertheless, that, *except as hereinafter specially provided*, this act shall not extend to any company for executing any bridge, road, cut, &c., &c., railway, pier, &c., which cannot be carried into execution without authority of parliament." So that the expression "joint-stock company" found in the 26th section, as interpreted by the 2d section, would not apply to railways, &c., which could not be carried into *execution without the authority [*293 of parliament, such companies not being specially provided for by that section: and, consequently, the prohibition against the sale of shares before complete registration was held not to extend to such companies. And the court appear to have been of opinion that the statute does not require companies that must obtain an act of parliament to be completely registered; so that such companies, in their opinion, are neither within the words nor the spirit of the 26th section.

On the argument of the case now before the court, it was contended that the 25th section, which gave to companies *completely registered* (including companies requiring acts of parliament) certain powers, followed by the 26th prohibiting shareholders in joint-stock companies not completely registered, from selling their shares, was analogous to the 23d section, which gives to the promoters of companies *provisionally registered* (including those for purposes requiring acts of parliament) certain powers; and that the 24th section, which follows, and imposes a penalty on the promoters for doing certain acts not authorized, must receive the same limited construction as the 26th, and be held inapplicable to companies requiring acts of parliament, inasmuch as they are not expressly mentioned.

The argument was ingenious: but, upon a careful examination of the statute, we do not think that the decision of the Court of Exchequer in the case of *Young v. Smith* requires us to put any such construction on that part of the statute which applies to companies provisionally registered.

The 4th section enacts, that, before proceeding to make public, whether by way of prospectus, &c., any intention or proposal to form any company for any purpose within the meaning of this act, *whether for executing any such work as aforesaid* under the authority *of parliament, or *for any other purpose*, the promoters must provisionally register. All joint-stock companies are therefore to be provisionally registered. Then the 23d section enacts that it shall be lawful for the promoters of companies provisionally registered (expressly including those for executing works by authority of parliament) to do certain acts, "but not to make calls, nor to purchase, contract for, or hold lands,

nor to enter into any contracts for any services," &c., &c. Then follows the 24th section, in these words,—“And be it enacted, that, if before a certificate of provisional registration shall be obtained, the promoters, or any of them, or any person employed by or under them, advertise the existence or proposed formation of the company, or make any contract whatsoever for or in the name or on behalf of such intended company, then every such person shall be liable to forfeit for every such offence a sum not exceeding 25*l*.”

Now, this section does not commence as the 26th does, by using the term “any joint-stock company.” If it had done so, we might have felt bound to give to it the same limited construction which it received in *Young v. Smith*. But, in the absence of any such expression, it appears to us that the 24th section must be construed by reference to the 23d, and be held applicable to all companies not provisionally registered, which, if so registered, would enjoy the privileges conferred by the 23d section.

This construction renders the 4th, 23d, and 24th sections consistent. The 4th requires that all joint-stock companies, whether requiring acts of parliament or not, before the promoters do any acts towards forming them, shall be provisionally registered. The 23d gives to the promoters of all such companies provisionally registered power to do certain acts. And the 24th imposes a penalty on the doing of any of those acts *before a certificate of provisional registration has been obtained. *295]

Another point made, but not much insisted upon, was, that the 24th section does not say that the contracts shall be void; but the imposition of a penalty shows that they are illegal, and therefore they cannot be enforced; as was decided in *Bull v. Chapman*, 8 Exch. 444.†

We are, therefore, of opinion that the first plea is good, and our judgment on the demurrer must be in favour of the defendant.

The second plea, founded on the 10 & 11 Vict. c. 78, s. 7, must on the same ground be held good. Judgment for the defendant.

HAYWARD v. PARKE and Others, Executors of ROBERT MATHER, deceased. June 12.

Upon a negotiation between A. and B. for the grant of a lease, B., the proposed lessee, informed the agent of A. that he wanted the premises for the purpose of carrying on therein the business of a retailer of beer, and inquired whether there was anything in the original lease to restrain the tenant from carrying on such business therein; to which inquiry the agent,—being ignorant of the contents of the lease, but knowing that such trade had been carried on upon the premises for some years,—replied that there was nothing, so far as he knew, to prevent the tenant from carrying on the proposed trade. B. thereupon consented to take a lease, and a memorandum to the following effect was drawn up, and signed by the respective parties:—

“Lease, twenty-one years from Lady Day, 1853. Taxes, &c. Lease and counterpart to contain all usual and proper covenants, and particularly those contained in the lease under which the premises are held, so that the same in no way restricts the trade of a retailer of beer. Lessee not to require production of the lessor’s title.”—

Held, that A. duly performed his contract by being ready to grant a lease without a covenant to restrict the lessee from using the premises as a beer-shop, notwithstanding that there was such a restrictive covenant in the lease under which he himself held.

THIS was an action brought by the plaintiff against the defendants, being the executors of Robert Mather, deceased, for a breach by Mather, and the defendants, as his executors, of an agreement in writing made between the plaintiff and Mather for a lease to the plaintiff of a messuage and premises, being No. 61, William Street, Regent’s Park, in the county of Middlesex, and premises [*296 in the rear thereof.

The declaration stated that the plaintiff and the said Robert Mather agreed that Mather would, within a reasonable time after the 18th of March, 1853, grant to the plaintiff a lease of the house and messuage, No. 61, William Street, Regent’s Park, and the premises in the rear, abutting on Little Albany Street, on the terms and conditions following, that is to say,—Rent 70*l.* per annum, payable quarterly; the first quarter to become due and payable at Midsummer Day, 1853: Lease, twenty-one years from Lady Day, 1853: Taxes of every kind, except property-tax, to be paid by the plaintiff, including sewers’ rate and land-tax, or the rent in lieu thereof: *Lease and counterpart to contain all usual and proper covenants, and particularly those contained in the lease under which the premises are held, so that the same in no way restricted the trade of a retailer of beer*: The said lease and counterpart to be prepared by the lessor’s solicitor, at the expense of the plaintiff: The plaintiff not to require production of the title of the said Robert Mather: Averment, that the plaintiff did all things necessary on his part to entitle him to have the said lease prepared and executed and granted to him as aforesaid, and to a performance by the said Robert Mather of the said agreement on his part, except so far as the said Robert Mather exonerated, prevented, and discharged the plaintiff from so doing, and had dispensed therewith: That, although after the making of the said agreement, and before the decease of Mather, a reasonable time had elapsed for the performance of the said agree-

ment, and although the plaintiff had at all times been ready and willing to fulfil the said agreement on his part—whereof Mather had, and since his decease the defendants had had, notice: Yet the said Robert *297] Mather did not, nor since his decease had the defendants, prepared the said lease, or executed or granted to the plaintiff a lease of the said house, messuage, and premises, according to the said agreement, but had severally wholly neglected and refused so to do; whereby the plaintiff, after having expended and laid out upon the said messuage, house, and premises, the sum of 500*l.* in and about repairing and making the same fit and convenient for the carrying on therein the trade or business of a retailer of beer, had lost and been altogether deprived of the great advantage and gain he would otherwise have received in being able lawfully to exercise and carry on, in and upon the said house, messuage, and premises, the said trade and business of a retailer of beer, and had also been deprived of the great advantage and gain, that is to say, the sum of 900*l.*, which he would otherwise have received from the assignment and disposal of the said lease of the said house, messuage, and premises, to one George Foyell, for the lawful exercise and carrying on therein of the said trade and business of a retailer of beer during the said term of twenty-one years; and he had also been put to, and necessarily incurred, divers charges and expenses, amounting to 200*l.*, in and about the negotiating and agreeing for the said demise and lease from the said Robert Mather as aforesaid, and having the said house, messuage, and premises so demised and leased, and in and about the investigating the right and title of the said Robert Mather to demise and lease the said house, messuage, and premises for the legal exercise and carrying on therein by the plaintiff of the trade and business of a retailer of beer, and in and about causing divers documents and writings respecting the same to be made and prepared, and in and about the endeavouring to procure the completion and fulfilment of the said agreement by the said Robert Mather and by the *298] defendants, and had *also been deprived of divers other great gains and profits which he, the plaintiff, would otherwise have derived, if the said Robert Mather and the defendants had fulfilled the said agreement: And the plaintiff claimed 2000*l.*

The defendants pleaded,—first, that Mather did not agree as alleged.

Secondly,—that a reasonable time had not elapsed after the making of the said agreement, and before the decease of Mather, for the performance of the said agreement; and that the defendants, as executors as aforesaid, after the death of Mather, and within a reasonable time, were ready and willing to perform the said agreement, and to perform and execute and grant the said lease; and that Mather did not, nor did the defendants, refuse so to do as alleged.

Thirdly,—that Mather, in his lifetime, and the defendants, as execu-

tors as aforesaid, since his decease, respectively, did and omitted to do, what is complained of, by the plaintiff's leave.

Fourthly,—that, after the making of the agreement, before any breach thereof, and in the lifetime of Mather, the plaintiff exonerated and discharged Mather from granting the said lease within such reasonable time as aforesaid.

The plaintiff joined issue on the first and second pleas, and traversed the third and fourth.

The cause came on to be tried before Jervis, C. J., at the sittings in Middlesex after Trinity Term last, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:—

Before and at the time of the making of the agreement between the plaintiff and Robert Mather hereinafter set forth, the messuage and premises No. 61, William Street, Regent's Park, and the premises in the rear thereof, were and thence hitherto have been, and still are, held under a lease for ninety-nine years, granted *by the Commissioners of Woods and Forests, whereof sixty years and upwards [*299 are still unexpired.

The above-mentioned lease for ninety-nine years contains the following covenant on the lessee's part,—“That the lessee, his executors, administrators, and assigns, shall not nor will, at any time during the continuance of the said term hereby granted, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or upon the said several pieces or parcels of ground, messuages, or dwelling-houses, buildings, and premises hereby demised, or on any or either of them, or any part thereof, respectively, or in or upon any other messuage or dwelling-house, erection, or building, which may hereafter be erected, built, set, or made upon the said ground hereby demised, or any part thereof, any or either of the trades or businesses of a vintner, distiller, brewer, *alehouse-keeper*, *victualler*, coffee-house or tavern-keeper, tripe-boiler, tripe-seller, slaughterman, soap-boiler, tallow-melter, sugar-baker, dealer in old iron, blacksmith, farrier, working cutler, chimney-sweeper, bagnio-keeper, coachmaker, and whitesmith, coppersmith, and working brazier, caricature printseller, working tinman, dyer, or any other noisy, noisome, or offensive trade or business whatsoever, without the express consent in writing of the said commissioners or surveyor-general for the time being respectively, under their or his hands or hand first had and obtained for that purpose.” And the said lease also contains a proviso empowering the lessors, and their successors, to re-enter upon all or any part of the premises demised by that lease, upon (amongst other things) the breach by the lessee, his executors, administrators, or assigns, of any of the covenants therein contained, and on his and their part to be kept and performed.

The legal estate in the said messuage and premises No. 61, William

*300] Street, Regent's Park, and the premises *in the rear thereof, under the said lease for ninety-nine years, before and at the time of the making of the said agreement, and thence until Robert Mather's death, was vested in Frederick Fowler Robertson and Thomas Newton Wing, in trust for the said Robert Mather, and since his death has been and still is so vested, in trust for the defendants, his executors; and the said Frederick Fowler Robertson and Thomas Newton Wing were always from the time of making the said agreement until the commencement of this action ready and willing to concur with the said Robert Mather in his lifetime, and the defendants, his executors, since his death, in granting, and to execute, any lease of the said messuage and premises, and the premises in the rear thereof, which he the said Robert Mather in his lifetime, and the defendants, his executors, since his death, may have been desirous of granting.

The trade and business of a retailer of beer had been publicly carried on upon the said messuage and premises for many years before the making of the said agreement, without objection from any one; and in March, 1853, the said messuage and premises were, and for some time before had been, in the occupation of Mrs. Crowder, as tenant from year to year to the said Robert Mather, and she then carried on in and upon the said messuage and premises the trade and business of a retailer of beer. Messrs. Thorne, the brewers, had been in the habit of supplying Mrs. Crowder with beer for the purposes of her trade; and, she being indebted to them, the trade-fixtures and utensils in and upon the said messuage and premises had been assigned to them by her as a security for such debt.

In the month of March, 1853, the plaintiff, being desirous of hiring the said messuage and premises, entered into a contract with Messrs. Thorne on their own behalf, and also as agents for Mrs. Crowder, by *301] *which the plaintiff agreed with Messrs. Thorne to purchase of them the trade-fixtures and utensils in and upon the said messuage and premises for the sum of 130*l.*, and to become tenant of the said messuage and premises in the place of the said Mrs. Crowder, if Messrs. Thorne could procure the plaintiff the lease of the said messuage and premises. In pursuance of this contract with Messrs. Thorne, the plaintiff, with their privity and knowledge, entered into a negotiation with Messrs. Cafe & Reid, the agents for Robert Mather, for a lease of the said messuage and premises; and, at a meeting which took place at Messrs. Cafe & Reid's office, on the 18th of March, 1853, at which the plaintiff and his attorney, Mr. Kennett, and Robert Reid, of the firm of Cafe & Reid, were present, the said Kennett informed the said Reid that the plaintiff wished to hire the said messuage and premises *for the purpose of carrying on therein the trade and business of a retailer of beer*, and inquired of Reid whether there was anything in the lease under which the said messuage and premises were held, to restrain the

tenant from carrying on such trade and business thereon; to which inquiry, Reid, not having a copy of such lease, and being ignorant of the contents thereof, and knowing that such trade and business had been carried on upon the said messuage and premises for some years, replied that there was nothing, as far as he knew, to prevent the tenant from carrying on the proposed trade and business of a retailer of beer in and upon the said messuage and premises: and thereupon the agreement upon which this action is brought was drawn up and signed by the plaintiff, and a duplicate was soon afterwards made and signed by Mather, as follows:—

“Terms for letting No. 61, William Street, Regent’s Park, and the premises in the rear, abutting on Little Albany Street.

*Rent 70*l.* per annum, payable quarterly, the first quarter to become due and payable at Midsummer Day, 1853. Lease twenty-^[*302] one years from Lady Day, 1853. Taxes of every kind, except property-tax, to be paid by lessee, including sewer’s-rate and land-tax, or the rent in lieu thereof. Lease and counterpart to contain all usual and proper covenants, *and particularly those contained in the lease under which the premises are held, so that the same in no way restricts the trade of a retailer of beer.* The said lease and counterpart to be prepared by the lessor’s solicitor, at lessee’s expense. Lessee not to require production of the lessor’s title.

“I agree to grant a lease of the premises on the terms and conditions herein contained, and to execute the same, when tendered.

“Dated this 18th day of March, 1853. “ROBERT MATHER.”

At the time the plaintiff signed the above agreement, neither the plaintiff nor his attorney, Kennett, had any knowledge whatever of the covenants contained in the lease for ninety-nine years under which the said messuage and premises, and the premises in the rear thereof, were held.

In pursuance of his contract with Messrs. Thorne, and of the above agreement with Mather, the plaintiff, on the 25th of March, 1853, entered upon and took possession of the said messuage and premises, and the premises in the rear thereof, and of the trade-fixtures and utensils therein; and thereupon Mrs. Crowder then gave up possession thereof to the plaintiff. On the 26th of March, 1853, the plaintiff, in pursuance of his contract with Messrs. Thorne, paid them 130*l.* for the said trade-fixtures and utensils.

Robert Mather, for some years before and at the time of the signature of the said agreement, and thence continually until his death, which took place on the 30th *of September, 1853, resided at Grant-^[*303]ham, in Lincolnshire, or at Leamington, in Warwickshire. Shortly after the signature of the above agreement, the plaintiff’s attorney, Kennett, applied by letter to Messrs. Cafe & Reid, the agents for

Mather, for the draft lease of the said messuage and premises mentioned in the agreement, and was by them referred to Messrs. Ostler & Co., of Grantham, Mather's solicitors; and a lengthened correspondence then took place between Kennett, as attorney for the plaintiff, and Ostler & Co., as attorneys for Mather, upon the subject of the lease, which correspondence was set out in an appendix to the case, and was to be referred to upon the argument of the case by either side, as if the same was set out in the case itself.

Ultimately, on the 12th of August, 1853, Mr. Reid, by the desire of Ostler & Co., sent a draft lease of the said messuage and premises, and the premises in the rear thereof, to Kennett, for his perusal and approval on behalf of the plaintiff. The draft lease so sent made and described as parties thereto the said Frederick Fowler Robertson and Thomas Newton Wing of the first part, Robert Mather of the second part, and the plaintiff of the third part, and contained the following covenant on the plaintiff's part to be performed: "And also that he the said George Hayward, his executors, administrators, or assigns, shall not nor will, at any time during the said term, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or upon the said messuage or dwelling-house and premises hereby demised, or in or upon any other messuage or dwelling-house, erection, or building which may hereafter be erected, built, set up, or made upon the said yard or ground hereby demised, or any part thereof, any or either of the trades or businesses of a vintner, distiller, brewer, *alehouse-keeper*, *victualler*, *304] **coffee-house or tavern-keeper*, tripe-boiler, tripe-seller, slaughterman, soap-boiler, tallow-melter, sugar-boiler, dealer in old iron, blacksmith, farrier, working cutler, chimney-sweeper, bagnio-keeper, coach-maker, white-smith, copper-smith, working brazier, caricature print-seller, working tinman, dyer, or any other noisome, noisy, or offensive trade or business whatsoever, without the express consent of the said Frederick Fowler Robertson and Thomas Newton Wing, their executors, administrators, or assigns, under their or his hands or hand first had and obtained for that purpose."

Kennett, the plaintiff's attorney, returned the draft to Ostler & Co. on the 11th of November, having first written in red ink in the margin thereof, opposite the description of the parties thereto, the following note, signed with his initials,—“I have no objection to these gentlemen (meaning Robertson and Wing) being made parties: but see agreement;” and having also first struck out from the covenant in the said draft lease above set out, the words “*alehouse-keeper*, *victualler*,” and written in red ink in the margin opposite the said covenant, the following note, signed with his initials,—“The house was expressly taken for the trade of a retailer of beer (see agreement), and that trade has long been carried on therein. The mention of these words (meaning *alehouse-keeper*, *victualler*) would prohibit such trade: see beer act, 11 G. 4 & 1

W. 4, c. 64, s. 81." And, on the same 11th of November, Kennett wrote and sent to Ostler & Co. the following letter:—

"I return you your draft lease, with some alterations. My client has, I find, entered into a contract to dispose of his lease, and the parties are pressing him for completion. May I beg, therefore, the favour of your letting me know by Monday if you approve of my alterations, and by suggesting a day on which it is *probable [*305 the business may be completed, that my client and his purchaser may make their arrangements."

Not having received any answer from Ostler & Co. to the last-mentioned letter, Kennett wrote other letters to them, but received no answer from them, they not being attorneys to the defendants, Mather's executors, and having ceased to act in the business since his death. But Mr. Henry Thompson, one of the defendants, having become attorney for the defendants, took upon himself the management of the negotiation with the said Kennett, with reference to the lease of the messuage and premises mentioned in the agreement of the 18th of March, 1853; and, on the 14th of December, 1853, Thompson wrote and sent to Kennett the following letter:—

"I am concerned for the late Mr. Mather's executors; and will take an opportunity, at an early day, of ascertaining the powers of the trustees to grant the lease of the house in William Street, in the form suggested by you."

The following correspondence thereupon took place between Thompson, as attorney for the defendants, and Kennett, as attorney for the plaintiff:—

Kennett to Thompson, December 20, 1853:—

"If the draft lease, as approved by me, is before you, you will perceive my alterations are not inconsistent with the agreement signed between the parties. My client has contracted to sell the lease, and the delay which has taken place is very costly to him, as he is only enabled to keep peace with the purchaser by paying him a weekly sum until completion. I trust you will, therefore, expedite the matter, so that further loss may be stayed,—a loss which is incurred solely by the delay in getting the lease executed."

Thompson to Kennett, December 26, 1853:—

"You shall have this draft in a few days; and, once *settled, [*306 there shall not be any delay in obtaining the completion of the lease."

Kennett to Thompson, January 2d, 1854:—

"There has been a delay of months in this matter, and, as it seems to me, quite unnecessarily. Not anticipating this delay, my client entered into a contract to sell the house and business, and he is only enabled to save himself from proceedings in equity to enforce the contract, by paying a weekly sum as compensation. He is besides obliged

to put the business under management, as he is a brewer, and not acquainted with the retail beer trade. In addition to all this, he has entered into pecuniary arrangements upon the strength of receiving the purchase-money, and the result altogether is absolutely ruinous to him. You must perceive that it is not right my client should suffer thus. You will not be surprised, therefore, when I beg you will understand, that, unless I receive the draft forthwith, my client will hold the estate of the late Mr. Mather responsible for such loss as may have been, or shall hereafter be, sustained by my client by reason of the non-performance of the contract entered into by the late Mr. Mather."

On the 16th of January, 1854, enclosed in a letter of that date to the following effect,—“Herewith you have draft lease. I regret that the covenants of the original lease prohibit any allowance of the abstraction of the words struck out,”—Thompson sent Kennett the draft lease, having first made the defendants parties thereto of the second part, instead of Mather, and restored the words “alehouse-keeper, victualler,” in the covenant in the draft lease above set forth.

The above-mentioned letter of the 16th of January, 1854, was the first notice the plaintiff or his attorney ever received that the lease for ninety-nine years under which the messuage and premises were held, prohibited the trades of alehouse-keeper and victualler being
*307] *carried on therein, except so far as the agreement of March the 18th, 1853, may be construed to be a notice to the plaintiff to that effect.

In answer to the said letter of January 16th, 1854, Kennett, on the 19th January, wrote and sent to the said Henry Thompson the following:—

“It is quite impossible for my client to allow the restriction against carrying on the trade of an alehouse-keeper or victualler to be inserted in the lease. My client purchased the fixtures, &c., of the late tenants, subsequently laid out a considerable sum in improvements expressly for those trades, and afterwards entered into a contract for the sale of the premises and good-will of the business for 372*l.* 10*s.*; the lease to contain only the ordinary covenants contained in leases of beer-houses; the purchase to be completed on the 26th of July last. Upon the draft being forwarded to me by Messrs. Ostler, the restriction you now insist upon appeared. Upon this being made known to Mr. Foyel, the purchaser, he refused to take an assignment; and the only way my client has been able to avoid proceedings being taken against him, has been, to pay Foyel a sum of 2*l.* weekly until he is in a condition to complete his part of the contract. So you perceive the dilemma in which my client is placed, and the loss which has arisen to him. On referring to the agreement between the late Mr. Mather and my client, you will see it is agreed in express terms that the covenants shall in no way restrict the trade of a retailer of beer; and also that my client is denied the opportunity of looking into the lessor's title. Any difficulty or loss,

therefore, has been through no fault of my client. I take your letter as a refusal on the part of the executors of Mr. Mather to grant a lease on the terms of the agreement, that is, to allow the trades of an ale-house-keeper or victualler *to be struck out. I must therefore [*308 lay instructions before counsel to advise what course I ought to adopt."

No answer was returned to this letter by the defendants or their attorney.

On the 3d of February, 1854, Thompson wrote to the plaintiff's attorney as follows:—

"The executors have had a conference upon the subject of this proposed underlease, and have concluded to agree to its completion without the restrictive words struck out. I shall therefore be obliged by your returning the draft by the first post, that I may forward it to the solicitor of the trustees of Mr. and Mrs. Mather's marriage settlement, in order to a speedy termination of the business."

On the 4th of February, the plaintiff's attorney, in reply to the above, wrote to Thompson, stating that he had laid a case before counsel on behalf of Hayward: and on the 20th, he again wrote to Thompson, as follows:—

"The agreement of March, 1853, and the delay which has taken place on the part of your clients, has been most injurious to Mr. Hayward. I informed you that Mr. Hayward had entered into a contract with Mr. Foyel for the sale of the premises; and that, with a view to avoid proceedings on the part of Mr. Foyel, Mr. Hayward had agreed to give him 2*l.* per week until the sub-purchase was completed. Mr. Foyel has now commenced proceedings against Mr. Hayward, the result of which must be very injurious, as it is quite clear, that, unless Mr. Mather's executors can perform their contract with Mr. Hayward, it is impossible for Mr. Hayward to perform his with Mr. Foyel. In my letter of the 4th instant, I informed you that I was about to lay before counsel a supplemental case. I have received his opinion, to the effect that the executors of *Mr. Mather are liable to a suit for specific [*309 performance of the contract of the 18th of March, 1853; and that Mr. Hayward is not bound to accept a lease purporting to be in conformity with the agreement, if it manifestly appears (as it is now admitted) that the lease under which Mr. Mather held, contained a restrictive covenant inconsistent with the agreement; Mr. Hayward not being bound to rely on a mere covenant for quiet enjoyment, and having had no notice of the original lease at the time the agreement was entered into. Under the circumstances, and having regard to the great pressure on my client, I am afraid I have no alternative, but to commence immediate proceedings, unless you can suggest some mode in which (by way of amicable arrangement) Mr. Hayward can be released from his present painful position."

On the 4th of March, 1854, the defendants served the plaintiff with a notice, signed by them, as follows:—

“To Mr. James Hayward.

“We, the undersigned, being the executors named in the last will and testament of Robert Mather, formerly of Grantham, in the county of Lincoln, and lately of Leamington, in the county of Warwick, gentleman, deceased, and also trustees under an indenture dated the 10th of February, 1853, and made between the said Robert Mather of the one part, and us the undersigned of the other part, do hereby give you notice that we are ready to grant to you a lease of the premises mentioned or described in an agreement under the hand of the said Robert Mather, dated the 18th day of March, 1853, pursuant to the said agreement.”

The above notice was by mistake addressed to “Mr. James Hayward,” instead of to “Mr. George Hayward,” but was intended for the plaintiff, as the plaintiff well knew. Robertson and Wing were ready and *310] willing to have joined with the defendants in granting *to the plaintiff such a lease as is mentioned in the above notice, and would have executed the same if the plaintiff would have accepted the same. The draft lease hereinbefore mentioned had been returned to Thompson by Kennett before the 4th of March, 1854. No answer was returned to the above notice of the 4th March, 1854; nor was any notice taken of the same by the plaintiff or his attorney: and, on the 17th of March, 1854, this action was commenced.

The plaintiff occupied the messuage and premises mentioned in the agreement of the 18th of March, 1853, from the 25th of March in that year, until the commencement of this action, and still occupies the same, and has during all the time since the 25th of March, 1853, to the present time, carried on the trade and business of a retailer of beer in and upon the said messuage and premises, without objection from any one, and, during the lifetime of Mather, paid him, and since his death has paid the defendants, as his executors, the annual rent of 70*l.* for the same, pursuant to the agreement.

Soon after the plaintiff entered upon the premises, and during the year 1853, and before the commencement of this action, he, upon the faith that a lease thereof would be granted him pursuant to the agreement, voluntarily and bonâ fide laid out and expended 170*l.* in improvements and repairs of the said messuage and premises, with a view to carry on thereon the trade and business of a retailer of beer; no part of which sum would have been laid out or expended upon the faith of a mere tenancy from year to year: and all benefit to the plaintiff from the expenditure of that sum will be entirely lost to the plaintiff, whenever the plaintiff's present holding of the premises shall be determined.

The plaintiff had also before the commencement of this action, be-

come, and still is, liable to pay Kennett, *his attorney, 18*l.*, for [*311 his costs and charges with reference to the said agreement of the 18th of March, 1853, and for conducting the negotiation with Messrs. Ostler & Co. and Thompson upon the subject of the lease, and for perusing and altering the said draft lease on the plaintiff's behalf. And the plaintiff, on the faith of the said agreement of the 18th of March, 1853, and believing that a lease would be granted him pursuant to the same, on the 13th of July, 1853, bonâ fide entered into a contract with one George Foyel for the sale and assignment to him, Foyel, of the said messuage and premises mentioned in the agreement of the 18th of March, 1853, for the then residue of the said term of twenty-one years for which the lease was to have been granted to the plaintiff pursuant to the said agreement, for the sum of 372*l.* 10*s.*, by way of premium; and the plaintiff, by the said contract, also agreed to give Foyel possession of the said messuage and premises, and to complete the contract, on or before the 26th of July, 1853: and Foyel, upon the execution of the contract between him and the plaintiff, paid the plaintiff 20*l.* as a deposit.

The plaintiff, in consequence of Mather's not having granted him a lease pursuant to the agreement of the 18th of March, 1853, was unable to fulfil his said contract with Foyel: and Foyel having, on the 13th of January, 1854, commenced an action against the plaintiff for the breach thereof, such proceedings were thereupon had, that, before the commencement of this action, the now plaintiff was forced and obliged to pay, and did pay, to Foyel, the sum of 40*l.* as compensation to him for the now plaintiff's breach of the said contract between him and Foyel, and the sum of 25*l.* for Foyel's taxed costs of the said action: and also, in addition thereto, repaid to Foyel the sum of 20*l.*, which had been paid as a deposit as above stated: and the now [*312 *plaintiff also, before the commencement of this action, became and still is liable to pay to Kennett, his attorney, 24*l.* for the now plaintiff's own costs in the said action *Foyel v. Hayward*, and which last-mentioned costs were fairly and properly incurred in the defence of that action.

It was agreed between the parties that the court should have power to make all necessary amendments in the pleadings, and to draw all inferences from the facts above stated, and from the correspondence set out in the appendix, which a jury might have drawn; and that the court should have all other powers necessary to determine the rights of the parties.

The question for the opinion of the court upon the facts above stated, and the correspondence set out in the appendix, was,—Whether the plaintiff was entitled to recover in this action. If the court should be of opinion that the plaintiff was entitled to recover, then the defendants agreed that a verdict should be entered for the plaintiff upon all

the issues joined in the action, and that judgment should be entered against the defendants for the amount of all the sums which the plaintiff had expended and paid, and become liable to pay, as above stated, or of such of the said sums as the court should direct; and that such judgment should be entered immediately after the decision of the case, or otherwise, as the court should direct. If the court should be of opinion that the plaintiff was not entitled to recover in this action, then the plaintiff agreed that a judgment of nonsuit should be entered against him immediately after the court should direct. (a)

*313] **Knowles* (with whom was *Tapping*), for the plaintiff. (b)—The short facts are these.—On the 18th of March, 1853, the plaintiff and Mather enter into a contract for the grant of a lease to the former of certain premises, Mather knowing he had no legal interest, and the names of the trustees not being introduced, and knowing also that the plaintiff was intending to carry on the business of a retailer of beer, and representing (by his agent) that there was no covenant in the original lease to prevent *the tenant from so using the premises. And *314] the contract contains this clause,—“Lease and counterpart to

(a) The parties having been unable to agree in the statement of the case, the matter was referred to Mr. Worledge, who, having been attended by the counsel on both sides, and having heard evidence, and what was urged on both sides, settled the case as above.

(b) The points marked for argument on the part of the plaintiff, were as follows:—

“1. That the testator, Robert Mather, did agree to and make the said contract of the 18th of March, 1853, in the declaration alleged.

“2. That, according to the true and proper construction of the said contract of the 18th of March, 1853, Mather and the defendants were bound to grant to the plaintiff a lease by virtue of which he could *legally* and *as of right* carry on the trade of a retailer of beer on the premises contracted to be demised.

“3. That a reasonable time had elapsed after the making of the agreement, and before the decease of Mather, for the performance by him of the agreement; and that the defendants, as such executors, after the death of Mather, and within a reasonable time, were not ready and willing to perform the agreement, and to prepare and execute and grant the lease in the contract of the said 18th of March, 1853, mentioned; and that both Mather before, and the defendants after his decease, refused so to do.

“4. That neither of the drafts of a lease sent to the plaintiff by Mather and the defendants, respectively, was such a draft of the lease as the plaintiff was bound to accept under the terms of the contract.

“5. That the plaintiff did not give leave to Mather, or to the defendants, as such executors, to do or omit to do what is complained of by the plaintiff in his declaration.

“6. That after the making of the agreement, and before any breach thereof, and in the lifetime of Mather, the plaintiff did not exonerate or discharge Mather from granting the said lease mentioned in the contract, within a reasonable time.

“7. That, as the covenants of the original lease to Mather prohibit the carrying on the trade of a retailer of beer on the premises contracted to be demised, Mather was not, nor were the defendants, at any time, able to fulfil or perform either the contract of the 18th of March, 1853, or the notice of the 4th of March, 1854.

“8. That the plaintiff has sustained damage by the breach by the defendants of the said contract to the sum of 474*l.* 10*s.*, which is made up of the following items:—

	£	s.	d.
“Improvements	170	0	0
“Loss of bargain, being loss on contract with Foyel	202	10	0
“Damages and costs in action Foyel v. Hayward	65	0	0
“Costs of plaintiff's attorney in respect of contract of 18th of March, 1853	13	0	0
“Costs of plaintiff's attorney in defending action Foyel v. Hayward	24	0	0

£474 10 0”

contain all usual and proper covenants, and particularly those contained in the lease under which the premises are held, *so that the same in no way restricts the trade of a retailer of beer.* The said lease and counterpart to be prepared by the lessor's solicitor, at the lessee's expense. *Lessee not to require production of lessor's title.*" Upon the faith of this agreement, the plaintiff took possession of the premises, paying an outgoing tenant 130*l.* for fixtures, and afterwards laid out 180*l.* in improvements and repairs. He then entered into a contract with a third person to assign him his interest in the premises for 372*l.* 10*s.* In due time a draft lease was sent to the plaintiff, but objected to, on the ground that it contained a clause restricting the tenant from using the premises for the retailing of beer. And it is not until the 3d of February, 1854,—after Mather's death, and after an action had been brought against the plaintiff by the person to whom he had contracted to assign the premises,—that an offer is made by Mather's trustees and representatives to grant a lease without the obnoxious clause. This, however, they had no power to do. Readiness and willingness implies ability.

*The main question is, what does the party agree to grant? A valid lease for twenty-one years, which by entering into the [315 agreement he represents that he has power to do, and, by the very terms of the contract, a lease without any restriction as to the carrying on the trade of a retailer of beer. In *Sagden's Vendors and Purchasers*, 11th edit., Vol. 1, p. 238, it is said: "*Primâ facie*, a man who agrees to take an under-lease must know that he is bound by all the covenants contained in the original lease, and therefore such a purchaser cannot object to usual covenants. And, as it is his duty to inform himself of the covenants contained in the original lease, if he enters and takes possession of the property, he may be bound by even unusual covenants. And, if the deeds are brought to his solicitor for inspection before the contract, who does or might inspect them, he will be considered to have purchased with notice of the covenants. But, although a man knows that the seller is only a lessee, yet, if the agreement contains stipulations, the purchaser may rely upon them, because such an agreement amounts to a representation that the seller is not prevented from granting such terms, and, if they are contrary to the covenants in the original lease, the purchaser is not bound: *Van v. Corpe*, 3 *Mylne & K.* 269. So, if the purchaser state the object which he has in purchasing, and the seller is silent as to a covenant in the lease prohibiting that object, his silence would be equivalent to a representation that there was no such prohibitory covenant; and it is unimportant that the seller was not aware of the extent or operation of the covenant: *Flight v. Barton*, 3 *Mylne & K.* 272." *Van v. Corpe* is also an authority to show that the "usual covenants" between landlord and tenant will not extend to covenants in restraint of trade. It may be said that the

stipulation that the lessee shall not call for the lessor's title, precludes the objection. That, however, clearly is not so. *In Warren v. Richardson, 1 Younge, 1,† in a suit for a specific performance of an agreement to accept a lease, the court, considering the defendant (the intended lessee) by his conduct to have waived all objections to the vendor's title, decreed a specific performance of the agreement; and referred it to the master to settle the lease. In settling the lease, it became necessary, for identifying the premises, to produce before the master the original lease under which the plaintiff was entitled to the property, and from which lease it appeared that the property in question was held, with other property, at one entire rent, and under some special covenants, no provision with respect to which was made in the agreement between the plaintiff and the defendant. On the hearing, for further directions, these facts being brought before the court in the shape of exceptions to the report, it was held, that, though the defendant had by his conduct waived his right to the production of the lessor's title, yet, as in the course of the proceedings it had become necessary to produce that title, and that production showed that a sufficient lease could not be made to the defendant according to the agreement, the court would not enforce a specific performance; and the bill was dismissed, but without costs. [CRESSWELL, J.—The only effect of such a stipulation, is, to change the burthen of proof. The intended lessee may notwithstanding show that the title is bad.](a) Here, the agreement amounts, not merely to a representation by Mather that he had power to grant a lease according to the proposed terms, but the agreement and his conduct amount to a representation that there is no obstacle to the grant of a lease in those terms.

*317] The next question is, whether a reasonable time had elapsed for the making of the lease. The contract was made on the 18th of March, and the draft lease was not sent until the 12th of August. That, at all events, was a reasonable time. In *Sellick v. Trevor*, 11 M. & W. 722,† six months was held a reasonable time for perfecting a title to copyholds. Here, five months elapsed before the first draft was sent, three more before the second was sent. Mather died in September, 1853, and the executors and trustees were not ready and willing to grant such a lease as the plaintiff was entitled to, until the 16th of January, 1854; and then even they had no power to grant it. What length of time will it be reasonable for a man to take for the doing of a thing which he can never do? [JERVIS, C. J.—Mather himself never offered to grant a lease without the restrictive covenant. As to him, therefore, there would probably have been a lapse of a reasonable

(a) In *Sellick v. Trevor*, 11 M. & W. 722,† Lord Abinger says: "By the conditions of sale, the defendants are not bound to produce any earlier title-deeds than the last copy of court-roll: that protects them from [proving] any other title anterior to that court-roll; but still the plaintiff is at liberty to show aliunde that the title is void."

time, provided the plaintiff's attorney had not detained the draft so long. He had it on the 12th of August, and he returned it with objections on the 11th of November.]

He then proceeded to contend that the plaintiff was not to be limited to nominal damages for the defendants' breach of contract, but was entitled to recover all the damages which had directly resulted to him therefrom; citing *Flureau v. Thornhill*, 2 Sir W. Bl. 1078, *Hopkins v. Grazebrook*, 6 B. & C. 31 (E. C. L. R. vol. 13), 9 D. & R. 22 (E. C. L. R. vol. 22), and *Robinson v. Harman*, 1 Exch. 850.† *CRESSWELL*, J., referred to *Walker v. Moore*, 10 B. & C. 416 (E. C. L. R. vol. 21): and *JERVIS*, C. J., referred to *Milne v. Marwood*, 15 C. B. 778 (E. C. L. R. vol. 80), where *Maule*, J., expressed considerable doubt upon this subject; (a) and he asked what business the plaintiff had to sell the premises, or to lay out money upon them, *before he was sure of his title. No judgment, however, was pronounced upon this [*318 point.

Hugh Hill (with whom was *Day*), contra. (b)—1. The first question in this case is, what is the contract these parties have entered into? *Mather* contracts to grant *to the plaintiff a lease for twenty-one [*319 years, such lease to contain all usual and proper covenants, and particularly those contained in the lease under which the premises were

(a) *Hugh Hill* stated that *Milne v. Marwood* was discontinued, and a fresh action brought, for a false representation, in which the defendants obtained a verdict.

(b) The points marked for argument on the part of the defendants, were as follows:—

"1. That the agreement of the 18th of March, 1853, appears to have been conditioned upon the lease under which the premises in question were held not in any way restricting the trade of a retailer of beer, and that it further appears that such lease *did* restrict such trade.

"2. That a reasonable time had not elapsed, after the making of the agreement, and before the decease of *Mather*, for the performance of the agreement; and that the defendants, as executors, after the death of *Mather*, within a reasonable time, were ready and willing to perform the agreement and grant the lease in such agreement mentioned; and that neither they nor *Mather* refused so to do.

"3. That *Mather* in his lifetime, and the defendants as executors since his decease, respectively, did and omitted to do what is complained of, by the plaintiff's leave.

"4. That, after the making of the agreement, and before any breach thereof, and in the lifetime of *Mather*, the plaintiff exonerated and discharged *Mather* from granting the said lease within the reasonable time in the declaration mentioned.

"5. That, after the making the agreement, and before any breach thereof, and after the death of *Mather*, the plaintiff exonerated and discharged the defendants, as executors of *Mather*, from granting the said lease within the reasonable time in the declaration mentioned.

"6. That it appears upon the case, and the correspondence referred to therein, that the plaintiff duly waived all objections to the granting of the lease by Messrs. *Robertson* and *Wing* in the case mentioned.

"7. That it appears upon the case, and the correspondence referred to therein, that the plaintiff, at the time of making of the agreement, and thence hitherto, always had notice of the restriction against carrying on the trade of a retailer of beer, contained in the lease under which the premises were held.

"8. That, if the court should be of opinion that the plaintiff is entitled to recover in this action, the damages so to be recovered by him should be merely nominal, as no real or special damage is shown by the case to have been caused to or sustained by him through any breach of the agreement by *Mather*, or by the defendants.

"9. That the damages, if any, sustained by the plaintiff in respect of the causes of action in the declaration mentioned, were caused and accrued by reason of his negligence, recklessness, and want of proper caution."

held, *so that* the same in no way restricts the trade of a retailer of beer. The words "so that,"—*ita quod*,—are words of condition. The true meaning of the contract is, that the one agrees to grant and the other to take a lease for twenty-one years, containing usual covenants; but all is to be dependent on this, that there is nothing to prevent Mather from granting such a lease. [CROWDER, J.—You read "so that" as "provided?"] In Sheppard's Touchstone, Vol. 1, p. 122, treating of conditions, the learned author says: "But here note that these words, *proviso*, *ita quod*, and *sub conditione*, albeit they be the most proper words to make conditions, yet do they not always make the estate by the deed to be conditional, but sometimes do serve for other purposes; for, the word *proviso* hath divers operations besides; for, sometimes it doth serve for and work a qualification or limitation, and sometimes it doth serve to make and work a covenant only. And then only (being inserted amongst the covenants of the deed) it doth make the estate conditional, when there are these things in the case,—1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself,—2. When it is compulsory to the feoffee, donee, &c.—3. When it comes on the part, and by the words of the feoffor, donor, lessor, &c.,—*320] *4. When it is applied to the estate, and not to some other matter; as, if one grant a manor with an advowson appendant, and, after the habendum and reservation of rent, amongst the covenants there is this clause inserted, 'provided that the grantee shall re-grant the advowson for the life of the grantor,' this is a good condition. And thus it may be also a condition and a covenant; as, if the words run thus, 'provided always that the feoffee, &c., doth covenant, &c., that neither he nor his heirs shall do such an act,' this is both a condition and a covenant." Why else were those words put in? [JERVIS, C. J.—To what do you refer "the same?"] It seems doubtful whether those words refer to the original lease, or to the covenants to be contained in the sub-lease. [CRESSWELL, J.—I should read it thus,—The premises are described, and the rent and so forth; and then the agreement goes on to provide that the lease shall contain all usual and proper covenants, and *that* lease shall also contain all the covenants in the original lease, so that (or provided) *that* lease (the original lease) in no way restricts the tenant from using the premises for the retailing of beer. "Same" being a word of reference, we must look at the antecedent, which clearly is, the original lease.] So reading the contract, what obligation does it impose upon Mather or his executors? To grant a lease for the term mentioned, which shall not contain a covenant restraining the tenant from carrying on the business of a retailer of beer therein. There was nothing to prevent Mather, in his lifetime, or his trustees and executors, after his decease, from granting such a lease. The case shows that the premises had already for many years been used as a beer-shop.

Mather would clearly have performed his contract, if he had been willing to grant a lease in the terms of the letter of the 3d of February, 1854.

2. The next question is, whether more than a reasonable time had elapsed before Mather, or his executors, *signified their readiness [321 to grant a lease in such terms as the plaintiff was bound to accept. It appears that the draft lease was first sent to the plaintiff's attorney on the 12th of August, 1853. That was received by the attorney without any objection on his part that it was sent too late; and it was retained by him until the 11th of November, when it was returned with the words "alehouse-keeper, victualler," struck out of the covenant. Up to that time, therefore, there clearly was no breach; the parties treat it as an open contract. In the mean time Mather had died. A correspondence then took place between the plaintiff's attorney, and Thompson, who acted as attorney for the defendants, the latter refusing to assent to the alteration in the draft lease; and, on the 19th of January, 1854, the plaintiff's attorney finally declines to accept a lease with those restrictive words. On the 3d of February, the defendants intimate their readiness to grant the lease in such a form as the plaintiff was bound to accept.

3. As to the damages, the plaintiff clearly could only be entitled to nominal damages. The only delay he can complain of, is, from the 19th of January till the 3d of February. Was he, by any conduct of the defendant, placed in any worse position during that interval? The plaintiff had no right to lay out money upon the premises so hastily: neither can he charge the defendants for the consequences of his improvident bargain with Foyel. The true principle upon which such damages are to be estimated is laid down in *Walker v. Moore*, 10 B. & C. 416 (E. C. L. R. vol. 21), *Worthington v. Warrington*, 8 C. B. 184 (E. C. L. R. vol. 65), and *Hanslip v. Padwick*, 5 Exch. 615.† *Van v. Corfe*, 3 Mylne & K. 269, and *Flight v. Barton*, 3 Mylne & K. 282, were cases of specific performance, in which the court proceeds upon certain equitable principles which can have no application to a case of this sort.

*Besides, it is not competent to the plaintiff to say that he [322 repudiates the contract, so long as he remains in possession, paying rent. That is an objection which goes to the whole root of the action.

Knowles, in reply.—By the agreement Mather contracts to grant the plaintiff a valid lease. How could that be a valid lease which apparently permitted the lessee to carry on his trade upon the premises, when he would be liable to be turned out the next day for a breach of the lessor's covenants in the lease under which *he* held? Mather expressly warrants by his contract that he has power to grant a lease under which the plaintiff may enjoy the premises without molestation and without restriction as to the particular trade. [CROWDER, J.—How do you con-

strue the sentence without reading the words "so that the same in no way restricts the trade of a retailer of beer" as applying to the covenants in the original lease?] "So that the *same*," according to the strict grammatical construction of the sentence, must refer to the lease to be granted to the plaintiff. [JERVIS, C. J.—The words are quite capable of a different construction. The lease to be granted to the plaintiff is to contain all usual and proper covenants, and particularly those contained in the original lease, provided they do not restrict the trade of a retailer of beer. If they do, they are to be omitted: and, if damage results to the sub-lessee, he has his remedy against the lessor or his representatives under the covenant for quiet enjoyment.] The covenant for quiet enjoyment cannot alter the effect of the agreement, which amounts to a representation on Mather's part that he has power to grant a lease which shall not in any way restrain the lessee from carrying on the trade of a retailer of beer. The lessee is entitled to a *323] valid lease. As to the damages, the plaintiff is clearly entitled to recover to the full extent of the loss he has sustained from the legal fraud of Mather. Cur. adv. vult.

JERVIS, C. J.—We have had an opportunity of considering this case. The view I took in the course of the argument is fortified on reflection, and I am of opinion that the defendants are entitled to judgment. Disembarrassed from the pleadings, the question is, whether the plaintiff is entitled to recover, and, if so, for how much. The main question between the parties arises upon the agreement referred to in the special case, which, after describing the premises, and stating the amount of the rent, proceeds thus,—"*Lease twenty-one years from Lady Day, 1858. Taxes of every kind, except property-tax, to be paid by lessee, including sewers-rate and land-tax, or the rent in lieu thereof. Lease and counterpart to contain all usual and proper covenants, and particularly those contained in the lease under which the premises are held, so that the same in no way restricts the trade of a retailer of beer.*" The said lease and counterpart to be prepared by the lessor's solicitor, at the lessee's expense. Lessee not to require production of the lessor's title." This agreement was drawn up after a conversation between the plaintiff and his attorney, and the agent for Mather, the intended lessor, in which the plaintiff's attorney informed the agent that the plaintiff wished to hire the premises for the purpose of carrying on therein the trade and business of a retailer of beer, and inquired of him whether there was anything in the lease under which the premises were held, to restrain the tenant from carrying on such business therein; to which inquiry the agent,—not having a copy of the lease, and being ignorant of its *324] contents, but knowing that such trade had been carried on upon the premises for some years,—replied that there was nothing, so far as he knew, to prevent the tenant from carrying on the proposed trade. On the part of the plaintiff, it was insisted that the contract

was, that the lease to be granted should contain no such restrictive covenant; that Mather must be in a condition to grant a lease without such covenant; and that, there being a covenant in the original lease forbidding the carrying on upon the premises the trade or business of an alehouse-keeper or victualler, Mather had no *power* to grant such a lease as he had contracted to grant. The question turns upon the construction of the instrument itself. I am of opinion that its true construction is not that which the plaintiff contends for. The lease is to be a valid lease for twenty-one years, transferring the property in the premises to the plaintiff during that term. Then it is to contain all usual and proper covenants. That would not include a restrictive covenant like that in question. Further, it is to contain all the covenants which are contained in the lease under which Mather held. There might or might not be in the original lease a covenant against using the premises for the sale of beer; therefore, the object of the plaintiff being to take the premises for a beer-shop, the agreement goes on,—so that the same,—which I understand to mean “provided the same,”—that is, the lease to be granted,—in no way restricts the trade of a retailer of beer. All the usual covenants are to be inserted, and particularly those contained in the original lease. Restrictive covenants are to be inserted, provided they do not prohibit the trade of a retailer of beer: if they do, they are not to be inserted. There is no positive warranty that the original lease does not contain a covenant prohibiting the use of the premises in the manner and for the purpose contemplated. But the proposed lease is to contain all the covenants that are in the original lease, but not such, if any, as restrain *the lessee from using them [*325 for the retailing of beer. And there was very good reason for that caution. If the original lease had contained a covenant prohibiting the use of the premises as a beer-shop, and a proviso for re-entry for a breach of that covenant, and there had been a similar covenant and proviso in Hayward's lease, and Hayward had carried on the business of a beer-shop keeper on the premises, he would have been guilty of a breach of covenant for which all parties might have been turned out, and Mather, his immediate lessor, would have had his remedy over against him for the loss of his interest. The avowed object of the plaintiff in taking the premises being to carry on therein the business of a retailer of beer, he would not have taken a lease with such a covenant. But, if the restrictive covenant were not in the sub-lease, he would not give Mather a remedy against him, if a forfeiture were incurred through his so using the premises. On the other hand, observe the effect of the covenant for quiet enjoyment, in the event of the sub-lessee being evicted by reason of his carrying on the business of a retailer of beer on the premises. Instead of Mather having a remedy against the plaintiff, the plaintiff would have a remedy against Mather. As against Mather, the plaintiff would have the privilege of carrying

on the beer business, notwithstanding the covenants in Mather's lease, and he would have a right of action against Mather for any injury he might sustain in consequence. I therefore think the true construction of the agreement is, that it contains no warranty that Mather had power to grant an unrestricted lease, but that the plaintiff was to have in his lease all usual covenants, and all the covenants in the original lease provided there was no restriction against the carrying on the business of a seller of beer on the premises, in which case the plaintiff would have a clear lease, free from all doubt or difficulty; but that, on *326] the other hand, if the original lease *did contain such a restrictive covenant, the plaintiff should have a remedy over against Mather, in the event of his sustaining any loss or damage therefrom.

Another question raised on the argument, was, whether a reasonable time had elapsed before the death of Mather, for him to have granted a valid lease; because Mr. *Knowles* says, that, if such reasonable time had elapsed before Mather's death, nothing that occurred subsequently could condone that, or take away a right of action once vested in the plaintiff. But I think there was no unreasonable lapse of time. The draft lease, it appears, was sent to the plaintiff's attorney on the 12th of August, 1853, containing a covenant to restrain the lessee from carrying on the trade or business of (amongst others) an alehouse-keeper or victualler, without the consent of Robertson and Wing. This draft was kept by the attorney for several months, till the 11th of November, when he returned it, having struck out of the covenant the words "alehouse-keeper, victualler." The reasonable time, therefore, must be computed from a day subsequent to the death of Mather: and, on the 3d of February, 1854, which was before action brought, the executors and trustees offered to grant the plaintiff a lease which I think was the proper lease to be granted in pursuance of the agreement. Upon the whole, therefore, I think there was no warranty on the part of Mather that the lease under which he held contained no covenant to prevent the premises being used in the way contemplated by the plaintiff, but that the contract was complied with by the offer of a sub-lease without such restrictive covenant, and that that offer was made within a reasonable time. I am, therefore, of opinion that there ought to be judgment of nonsuit.

*327] CRESSWELL, J.(a)—I have nothing to add to what *has been said by my Lord, except to observe the serious consequences that might result if the sub-lease had contained the same restrictive covenant as was contained in the original lease. It appears to have been a building lease; and the covenant in question applied to "any other messuage or premises" which might be erected under that lease: and there were still about sixty years of the term unexpired. There was

(a) Maule, J., was absent.

very good reason, therefore, for not inserting that covenant in the sub-lease to the plaintiff.

CROWDER, J.—I am of the same opinion. I do not desire to add anything: but I would merely advert for a moment to the terms of the agreement. It was contended by Mr. *Knowles*, that the words “so that *the same* in no way restricts the trade of a retailer of beer,” referred to the lease to be granted, and not to the original lease under which Mather held. It seems to me, that, whether “the same” referred to the one or the other, the result would be the same. In either case, a lease omitting the restrictive covenant as applicable to the trade of a retailer of beer, would be such a one as the parties stipulated for.

Judgment of nonsuit.(a)

(a) The covenant for quiet enjoyment was in these terms:—“And each of them the said F. F. Robertson and T. N. Wing, doth hereby for himself, his executors, administrators, and assigns, covenant with the said George Hayward, his executors, administrators, and assigns, that he and they, paying the rent hereby reserved, and performing, and observing the covenants, stipulations, restrictions, and agreements hereinbefore contained, shall and may peaceably hold and enjoy the said premises hereby demised, during the said term, *without the lawful let, suit, trouble, eviction, or interruption of the said F. F. Robertson and T. N. Wing, his executors, administrators, or assigns, or of any person or persons lawfully claiming or to claim by, from, or under them, or any of them.*” *Quære*, as to the plaintiff’s remedy upon this covenant, in the event of an eviction for his breach of the covenant in the original lease?

*NEAVE v. AVERY and Others. June 8. [*328

An equitable defence, under s. 83 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, cannot be pleaded in ejectment,—there being, since the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, no *plea* in that form of action.

To a writ of ejectment calling upon John Avery, Louis England, George Jary, Thomas Mayhew, and Francis Williams, and all persons entitled to defend the possession of “a certain piece or parcel of land situate on the south side of Shepperton Street, in the parish of St. Mary, Islington, in the county of Middlesex, and the messuages or tenements erected thereon, and known as Nos. 1 and 2, in Shepperton Street aforesaid, with their appurtenances,” to appear and defend the said property, or any part thereof:—one Frederick Davidge appeared, and pleaded as follows:—

“For defence on equitable grounds,” the defendant F. Davidge, by H. T., his attorney, says, that the piece or parcel of land situate on the south side of Shepperton Street, in the parish of St. Mary, Islington, in the county of Middlesex, and the messuages or tenements erected thereon, and known as Nos. 1 and 2, in Shepperton Street aforesaid, with their appurtenances, being the premises claimed in this action, were, together with other premises, demised by one Louis England, by indenture dated on or about the 3d of January, 1826, to one John Walker, his executors, administrators, and assigns, for the term of

twenty-one years, wanting twenty-one days, from Lady Day, 1825, at the yearly rent of 25*l.*; and that, by the said indenture, the said Louis England covenanted, for himself, his executors, administrators, and assigns, with the said John Walker, his executors, administrators, and assigns, that he the said Louis England, his executors, &c., would, at his and their own costs and charges, at the end as well of the term of twenty-one years granted to him the said

*329] Louis England, by the lease under which he then held the premises thereby demised, with others, as of every further term that should be granted of all the said premises, unto the said Louis England, his executors, &c., not exceeding in the whole the term of eighty-four years, to be computed from the 29th of September, 1824, apply for and obtain from the superior landlord of the said premises a lease of the said premises for a further term of twenty-one years, and so from time to time until the whole term of eighty-four years, to be computed from the said 29th of September, 1824, should have expired by effluxion of time; and that he, the said Louis England, his executors, &c., would, at the expense, cost, and charges of the said John Walker, his executors, administrators, or assigns, nominee or nominees, from time to time, on obtaining such renewed lease or leases, grant and execute unto the said John Walker, his executors, &c., a lease or leases of the premises demised by the said indenture of the said 3d of January, for the term or respective terms to be granted by the said Louis England, his executors, &c., wanting twenty-one days of such term or respective terms, but so that every such renewed lease thereby covenanted to be granted, should be under and subject to the said yearly rent of 25*l.*, and to such and the like covenants, stipulations, and agreements as were therein-before reserved and contained, and which by and on the part of the said Louis England, his executors, &c., were or ought to be observed, performed, fulfilled, and kept, and provided the lessee to be therein named did, at his own costs and charges, execute and deliver a counterpart of every such lease unto the said Louis England, his executors, &c., by whose solicitor every such lease and counterpart should be prepared: That, by indenture bearing date on or about the 24th of May,

*330] 1826, the said John Walker assigned all his interest in the said lease of the 3d of January, for the remainder of the term thereby granted, to the said Louis England, his executors, &c.; that, by indenture bearing date on or about the 25th of October, 1826, the said Louis England did, for himself, his executors, &c., covenant with one Ann Gearing, her executors, &c., that he the said Louis England, his heirs, executors, or administrators, would, during the lives of the said Ann Gearing and her sisters Mary Gearing and Elizabeth Gearing, and of the then Princess (now Queen) Victoria, and the lives and life of the survivors and survivor of them, pay unto the said Ann Gearing, her executors, &c., an annuity or yearly sum of 36*l.*; and the said

Louis England did thereby assign the said lease of the 3d of January, 1826, and the term thereby granted, unto Andrew Duncan, a trustee named by the said Ann Gearing for the purpose thereafter mentioned, his executors, &c., together with the full benefit of the said covenant for granting leases of the said premises during the said term of eighty-four years, upon certain trusts for more effectually securing the payment of the said annuity to the said Ann Gearing, her executors, &c., who were respectively to have power to change such trustee whenever they should think proper,—a memorial of which said last-mentioned indenture was duly enrolled in the High Court of Chancery, as required by the statute in that behalf; that, by sundry good and lawful assurances, the right to the said annuity is now vested in the defendant; that the said Andrew Duncan is now dead; and that there is no personal representative of the said Andrew Duncan: That, after the making of the said indenture of the 3d of January, 1826, and before the making of the said indenture of the 24th of May, 1826, the said Louis England assigned by indenture all his right to the reversion of the premises demised by the said indenture of the 3d of January, expectant on the *determination of the said lease, and subject to the said lease, [331 to one Thomas Rance; that, by sundry good and lawful assurances, the said reversion became and was, in or about the year 1845, vested in two persons named William Marriott and Walter Griffith; that, at the expiration of twenty-one years granted to the said Louis England by the lease under which, at the time of the making of the said indenture of the 3d of January, the said Louis England held the last-mentioned premises, with others, they the said William Marriott and Walter Griffith did apply for and obtain from the superior landlords of all the said premises comprised in the lease under which the said Louis England at the time of the making of the said indenture of the 3d of January held the same, a renewed lease of all the said premises, for twenty-one years; that the said William Marriott and Walter Griffith have since assigned the said renewed lease to the plaintiff; that the only title which the plaintiff has to the premises claimed in this action, is, through such last-mentioned assignment; that, at the time of the said assignment, the plaintiff had notice of the before-mentioned covenant on the part of the said Louis England, his executors, &c., contained in the said indenture of the 3d of January; and that the plaintiff had received the sum of 25*l.* per annum as and for rent due to him from the date of the said assignment up to the including Midsummer Day last, for the premises comprised in the said indenture of the 3d of January, in the same manner as if a renewed lease had been granted of the said premises: That, ever since the said renewed lease was obtained as above mentioned, the several persons entitled to the said annuity, and through whom the defendant claimed, and the defendant, had respectively been ready and willing to accept a renewed lease

of the premises comprised in the said indenture of the 8d of January, *332] including the premises *claimed in this action, and to pay the costs and charges of the same, and to execute and deliver to the person granting such lease a counterpart thereof; yet that neither the said William Marriott and Walter Griffith, nor the plaintiff, have or has ever granted to the defendant, or to any other person, a renewed lease of the premises comprised in the said indenture of the 8d of January, including the premises claimed in this action: And that, if such renewed lease as last mentioned had been granted, the plaintiff would not, at the time of the commencement of this action, have had any right to recover possession of the premises claimed in this action.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that equitable pleas are altogether inadmissible in actions of ejectment."

The defendant joined in demurrer.

*333] *Unthank*, in support of the demurrer.(a)—Formerly, *the defendant in ejectment could generally plead only not guilty; the only recognised exceptions were, a plea to the jurisdiction, which might be pleaded by leave of the court, or a plea of ancient demesne: see Adams on Ejectment, 4th edit. pp. 228, 229. But then comes the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, which alters the whole form of proceeding, and s. 168 substitutes for the old declaration and notice a writ directed to the persons in possession by name and to all persons entitled to defend the possession of the property claimed, which property is required to be described in the writ with reasonable certainty: and s. 178 provides for the making up the issue,—enacting that "in case an appearance shall be entered, an issue may at once be made up, without any pleadings, by the claimants or their attorney, setting forth the writ, and stating the fact of the appearance, with its date, and the notice limiting the defence, if any, of each of the persons appearing, *so that it may appear for what defence is made*, and directing the sheriff to summon a jury;" and it then goes on to direct the form

(a) The points marked for argument on the part of the plaintiff, were,—

"1. That equitable defences are inadmissible in ejectment:

"2. That the plea does not disclose any defence upon equitable grounds, because it does not show that the plaintiff had any notice that the premises claimed in this action were those to which the covenant of the said Louis England related, or that the lease assigned to him was a renewal of the lease containing that covenant:

3. That it does not state or show that the several persons to whom the new lease ought to be granted, were ready or willing to receive the same, or that the plaintiff or Marriott and Griffith had notice thereof, or that any request to grant such lease was ever made:

"4. That it is consistent with the plea, that Duncan, or any other person entitled to the renewed lease, might have refused to accept the same:

"5. That it is consistent with the plea, that the tenant in possession of the premises may have been the plaintiff's tenant under a demise from him, and that such tenancy may have been legally determined:

"6. That it is consistent with the plea, that the plaintiff may now be seeking to recover the premises for the very purpose of granting a renewed lease according to England's covenant:

"7. That there does not appear to be any privity between the tenant in possession and the defendant."

of the issue. If the matter stood there, there could be no doubt that there could be no plea in ejectment. The difficulty arises from the 83d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts that, "it shall be lawful for the defendant, or plaintiff in replevin, in *any* cause in any of the superior courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief, by way of defence, and the said courts are hereby empowered to receive such defence by way of plea; provided that such plea shall begin with the words 'For *defence on equitable grounds,' [*334 or words to the like effect." That clause evidently applies only to actions which involve pleadings, and consequently does not apply to ejectments, in which there are no pleadings. The two statutes are to be taken in *pari materia*. It would give rise to much embarrassment if legal and equitable titles were to be mixed up together. Though Lord Mansfield was entitled to favour the contrary view, ever since Lord Kenyon's time the action of ejectment has been strictly confined to legal rights. [CROWDER, J.—The words of the 83d section of the 17 & 18 Vict. c. 122, are very large.] No doubt they are: but they clearly must be construed by a reference to the previous provisions, which altogether abolish pleading in ejectment. [MAULE, J.—Equitable grounds of defence arise so often in ejectment, that one would naturally have expected to find a separate and distinct provision as to ejectments. The intention of the 83d section is not very easily made out as to this. The 84th section provides that "any such matter which, if it arose before or during the time of pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querela*:" and the 85th provides that "the plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words 'For replication on equitable grounds,' or words to the like effect." Would either of these provisions apply to ejectments? Then, the right to plead equitable defences, is qualified by the 86th section; "Provided always, that, in case it shall appear to the court, or any judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a court of law so as to do justice between the parties, it shall be [*335 lawful for such court or judge to order the same *to be struck out, on such terms, as to costs or otherwise, as to such court or judge shall seem reasonable." An application was made in this case, to Cresswell, J., at Chambers, but without effect. [CRESSWELL, J.—The application to me was, to strike out the plea because it could not be pleaded at all; not under the 86th section. How did the plea get upon the record? As soon as Davidge appeared, the plaintiff might have made up the issue. JERVIS, C. J.—You demur to the plea, because it

should not be upon the record; but you put it there.] If it is no answer to the action, its being upon the record will not better the defendant's position. [JERVIS, C. J.—Ancient demesne would not be pleadable now. So, an equitable defence, which requires to be pleaded in a particular form, clearly cannot be available in a form of action which admits of no pleading. I think we must hear what can be said on the other side.]

G. Taylor, contra.—The 178th section of the 15 & 16 Vict. c. 76, which enables the plaintiff to make up the issue without any pleadings, never could have been intended to preclude the defendant from availing himself of a just defence. [CRESSWELL, J.—What is he to plead to?] To the writ. [CRESSWELL, J.—That is unusual. You are called upon to appear to the writ, not to plead.] If the statement of the plaintiff's claim upon the face of the writ,—which, in the case of ejectment, is tantamount to a declaration,—is such as to enable him to see what the claim is, why should the defendant be precluded from answering it? [JERVIS, C. J.—The same argument might be urged to show that you might have pleaded to the *capias* in the Common Pleas, or to the *quo minus* in the Exchequer,—that the plaintiff does not owe the Crown 500*l.*] The object of the 15 & 16 Vict. c. 76, ss. 168—178, was, the *336] abolition of useless forms; that of the 17 & 18 Vict. c. 125, s. *83, was, to admit equitable defences to be pleaded in *all* actions, instead of driving parties to the dilatory and expensive course of applying to a court of equity. [MAULE, J.—Not to let in pleading, where pleading was not allowed but for that section: only to allow an equitable defence to be pleaded where a legal defence could before have been pleaded. JERVIS, C. J.—What is there to give judgment upon? The appearance traverses the title. The plaintiff has chosen to put upon the record something which ought not to be there. We cannot give judgment that he recover the term. The utmost we can do, is, to strike out the case, and leave the plaintiff to apply under s. 86, to strike out the impertinent matter.]

Unthank.—The court may at all events decide that the plea is bad. [CRESSWELL, J.—The want of a plea in ejectment is no ground for a judgment. The defendant was not bound to plead. MAULE, J.—The 15 & 16 Vict. c. 76, puts an end to declarations in ejectment. In sweeping away the declaration and notice, there cannot be a doubt that it also sweeps away all pleadings. An equitable plea may be disposed of by a judge by a summary order, if he thinks it inconvenient that it should be allowed.] The court may here pronounce a judgment, that, notwithstanding the plea, the plaintiff recover the term: that would still leave the issue joined to be tried. [MAULE, J.—The plaintiff has done all that is necessary to assert his title, and the defendant has done all that is necessary to deny it. In effect, it is like the case of an issue joined upon a plea, and the plaintiff comes to ask the court for judg-

ment. He cannot do that, for he has not proved his title. So, the defendant cannot ask for judgment, because the issue in fact remains to be tried. All we can do, is, to strike it out, as my Lord suggests. I think a plea is not *admissible. A "plea" means a plea in the sense of an answer to a declaration; the 85th section, which [*337 speaks of a replication to a plea, shows that. In ejectment, there is no declaration to start from; so there can be no plea. There is, therefore, nothing on the record to enable us to decide. I do not think an "equitable defence" is available at all in an action of ejectment.]

Per Curiam.

Demurrer struck out.(a)

(a) The plaintiff afterwards applied to a judge at Chambers for leave to strike out the plea and demurrer; but it was refused, the learned judge intimating that there was nothing to prevent the plaintiff from making up and delivering a new issue in the proper form.

BOURNE v. SEYMOUR. May 30.

The defendant, by bought and sold note, contracted to sell to the plaintiff "about 500 tons nitrate of soda in bags, of good merchantable quality," to be ready for delivery by a given day, at a certain price and upon certain terms and conditions. The contract then proceeded,—“It is understood that the above nitrate of soda is to form the full and complete cargo of the *John Phillips*, 345 tons register, now on her passage to Sydney, to proceed thence without undue delay to the west coast of South America, there to load the above. In the unexpected event of the *John Phillips* getting ashore, or being unable to prosecute her voyage, from any casualties of the sea, then the seller agrees to deliver, and the buyer agrees to take, in lieu thereof, another cargo or cargoes of about equal quantity, to be named at the earliest practicable period prior to arrival off the coast. The only ground on which the seller is to be excused delivery of the above nitrate of soda, is, the loss of the said vessel (or that which may be substituted for it) on her homeward voyage; in which case this contract is to be considered void, but in no other event whatever:—”

Held, that this was an absolute contract for the sale of 500 tons (more or less), and not of a quantity limited by the capacity of the vessel named; though *semble* (*per* Maule, J.), that the incapacity of the *John Phillips* to carry the whole 500 tons would excuse the seller from bringing it all home by that vessel.

Held also, that the contract did not amount to a warranty that the *John Phillips* should be of capacity to carry the whole 500 tons.

THIS was an action upon a contract for the sale of a quantity of nitrate of soda. The first count of the declaration stated, that, on the 10th of November, 1853, the plaintiff agreed with the defendant to buy of him, and the defendant agreed with the plaintiff to sell and *deliver to him, about five hundred tons of nitrate of soda, in [*338 bags, of good quality, to be ready for delivery before a day in that behalf agreed, at 16l. per ton, with a fair allowance for sea-damage, if any. Should the refraction exceed five per cent., the surplus to be allowed. To be landed, if required, in the London or St. Katharine Docks at the expense of the defendant. Prompt, three months from final day of landing. Deposit 15 per cent., payable on delivery of dock weight-notes. Usual London terms and conditions. On any portion which it might suit the plaintiff to take direct from ship's side, all saving

48 Mich 221:

in expense thereby effected to be allowed, viz., 2s. 4d. per ton for landing expenses, and three months' rent and interest, the latter at the rate of five per cent. per annum upon the invoice amount of such portion. And it was further understood and agreed between the plaintiff and defendant, that the above nitrate of soda was to form *the full and complete cargo of the John Phillips*,—845 tons register,—then on her passage to Sydney, to proceed thence without undue delay to the West Coast of South America, there to load the above; and that, in the unexpected event of the John Phillips getting ashore, or being unable to prosecute her voyage from any casualties of the sea, then the defendant should deliver and the plaintiff take in lieu another cargo or cargoes of about equal quantity, to be named at the earliest practicable period prior to arrival off the coast, the nitrate of soda so substituted being liable to all the conditions of that contract; and that the only ground on which the defendant should be excused delivery of the above nitrate of soda, was, the loss of the said vessel, or that which might be substituted for it, on her homeward voyage; in which case, that contract was to be considered void, but in no other event whatever: Averment, that the plaintiff had fulfilled everything on his part to be fulfilled, *839] and everything had taken place *necessary to entitle him to the fulfilment of the said contract on the defendant's part, and none of the said casualties happened to the said John Phillips, or to the said nitrate of soda; and the said John Phillips safely proceeded upon and completed the voyage so contemplated as aforesaid: That the plaintiff had always been ready and willing to accept and receive the said quantity of nitrate of soda according to the said contract, and the time for the delivery thereof according to the said contract had elapsed; and that the defendant, although he had delivered to the plaintiff a small quantity of such nitrate of soda, had not delivered to the plaintiff the said quantity of about five hundred tons thereof so agreed to be sold and delivered as aforesaid; and that the said vessel only took on board, and in fact arrived and completed her voyage with, a quantity of nitrate of soda much less than the quantity so agreed to be sold and delivered as aforesaid, *and less than a full and complete cargo thereof*, whereby the plaintiff had lost great gains and profits.

The second count stated that, on the 10th of November, 1853, at London, the plaintiff agreed to buy of the defendant, and the defendant agreed to sell to the plaintiff, a quantity of nitrate of soda, by and upon the terms of corresponding bought and sold notes, in which the plaintiff was described as Messrs. A. Bourne & Co., being his name of business, and the defendant by the name of George Seymour, Esq., and that the tenor of the bought note was as follows, that is to say, "London, 10th Nov. 1853. Bought for account of Messrs. A. Bourne & Co., from G. Seymour, Esq. About five hundred tons nitrate of soda, in bags, of good merchantable quality, to be ready for delivery before the 31st of

December, 1854, at 16*l.* per ton, with a fair allowance for sea-damage, if any. Should the refraction exceed 5 per cent., the surplus to be allowed. To be landed, *if required, in the London or St. Katharine Docks, at the expense of the seller. Prompt three months [*340 from final day of landing. Deposit 15*l.* per cent., payable on delivery of dock weight-notes. Usual London terms and conditions. On any portion which it may suit the buyers to take direct from ship's side all saving in expense thereby effected to be allowed, namely, 2*s.* 4*d.* per ton for landing expenses, and three months' rent, and interest, the latter at the rate of five per cent. per annum upon the invoice amount of such portion. It is understood that the above nitrate of soda is to form *the full and complete cargo of the John Phillips* (345 tons register), now on her passage to Sydney, to proceed thence without undue delay to the West Coast of South America, there to load the above. In the unexpected event of the John Phillips getting ashore, or being unable to prosecute her voyage, from any casualties of the sea, then the seller agrees to deliver, and the buyers agree to take, in lieu thereof, another cargo or cargoes of about equal quantity, to be named at the earliest practicable period prior to arrival off the coast; the nitrate of soda so substituted being liable to all the conditions of this contract. The only ground on which the seller is to be excused delivery of the above nitrate of soda, is, the loss of the said vessel, or that which may be substituted for it, on her homeward voyage; in which case this contract is to be considered void, but in no other event whatever. Corrie & Co." Averment, that the said phrase "usual London terms and conditions" in the said contract, meant, that payment of the residue of the said price should be made by the plaintiff in cash upon delivery to him of the said nitrate of soda, and that, in weighing the said nitrate of soda, after arrival in London, certain customary and fixed allowances should be made to the plaintiff in respect of the weight of the said bags: That the said John Phillips arrived at Sydney, and *proceeded thence, [*341 according to the said contract, to the West Coast of South America, and there loaded and took on board a cargo of the said nitrate of soda, in bags, and completed her said voyage, and arrived at her port of discharge in safety; and that the plaintiff had done everything on his part, and everything had taken place and happened, to entitle him to complete fulfilment by the defendant of the said contract on his part: That the said vessel was, at the time of the making of the said contract, and ever since, wholly incapable of holding and carrying about five hundred tons of nitrate of soda in bags, and was only capable of holding and carrying a much less quantity, and by reason thereof, and of the cargo taken in by the said vessel in consequence of the incapacity aforesaid not amounting to about five hundred tons of nitrate of soda, and only amounting to a much less quantity, the defendant had only been able to deliver, and had only delivered, such less quantity to the

plaintiff; and the plaintiff had lost the advantage he would have derived from receiving the difference between the said less quantity and about five hundred tons. And the plaintiff claimed 1500*l*.

Third plea, to the first count, that the said contract was and is in the words and figures and to the purport and effect following, that is to say [setting it out verbatim, as in the second count]; and that the said vessel the John Phillips loaded and took on board on the West Coast of South America, a full and complete cargo of such nitrate of soda, in bags, according to the said contract, and thence sailed and proceeded on her homeward voyage to London, and arrived and completed her said voyage with such full and complete cargo of nitrate of soda on board, excepting only a certain portion thereof which was unavoidably lost in the course of the said voyage, without any default of the defendant or *342] the persons navigating the said ship, by perils of the seas; *and that the defendant delivered to the plaintiff the said full and complete cargo of nitrate of soda, excepting only such portion thereof as was so lost as aforesaid, according to and in performance of the said contract.

To the second count, the defendant demurred, the ground of demurrer stated in the margin being, "that the defendants only sold such a quantity of nitrate of soda as would form a full and complete cargo of the John Phillips, which was supposed to be capable of taking in about five hundred tons; but the defendant did not warrant that the ship was capable of doing so." Joinder.

The plaintiff demurred to the third plea, the ground of demurrer alleged in the margin being, "that the defendant was bound to deliver about five hundred tons, the vessel not having been lost."

Tomlinson (with whom was *Montague Smith*) claimed the right to begin, on the ground that the defendant's was the first demurrer.

Willes (with whom was *Byles*, Serjt.) submitted, that, there being demurrers on both sides, the plaintiff had a *primâ facie* right to begin; and he stated that it had been so decided in the Court of Exchequer.(a)

Per Curiam.—We think the plaintiff should begin.

*343] *Willes*, for the plaintiff.(b)—The question is whether, *under this contract, the plaintiff is not to have "about" five hundred tons of nitrate of soda, that is, five hundred tons, with a reasonable allowance for short delivery, and whether the contract does not import a warranty that the John Phillips shall be capable of carrying that quantity. The argument on the other side will be, that the plaintiff

(a) See *Franks v. Price*, 6 Scott, 714.

(b) The point marked for argument on the part of the plaintiff, were,—

"That the agreement imports a warranty that the vessel could hold about five hundred tons of the nitrate of soda; and that, if she arrived without accident such as described in the agreement, that quantity should be delivered;—that the description of the cargo as 'about five hundred tons,' came first in the contract, and could not be rejected or cut down;—and that partial loss on the voyage, arising probably from the insufficiency of the vessel, could form no excuse."

was to have the full and complete cargo of the vessel named: but, if that were the intention of the parties, the first description, "about five hundred tons," becomes wholly idle and inoperative. The defendant agrees to deliver a certain quantity on or before a given day; and the description of the John Phillips and the other ship or ships is given, not to limit the quantity to be delivered, or the duration of the voyage, but to show that the seller is to be excused from the performance of the contract if the John Phillips, or the substituted vessel, should be lost on her homeward voyage, having the nitrate of soda on board. Suppose the vessel should arrive, and be found incapable (apart from her measurement) of carrying more than three hundred tons, would the contract be satisfied? [CRESSWELL, J.—Suppose the defendants put 345 tons on board the John Phillips, and she would not carry more, would he not satisfy his contract by sending the rest by another vessel?] He has contracted to deliver 500 tons, and has stipulated that that quantity shall be brought home by the John Phillips: the plaintiff is entitled to have the whole by that vessel, unless she is lost. The John Phillips is a known vessel. The contract is for the sale of a specific quantity, to be carried by a given ship. The word "about" has a well known meaning amongst mercantile men: it is introduced for the purpose of protecting the seller against slight deficiencies of weight: *Moore v. Campbell*, 10 Exch. 328.† *Suppose a shipowner undertakes to carry [*344 timber by a particular ship, *about* one hundred feet long,—would it be any answer to a breach of his contract, to show that the vessel was incapable of carrying timber more than fifty feet long? [MAULE, J.—You say that the case of the John Phillips not being able to carry *about* five hundred tons of nitrate of soda, is an event which the contract has not provided for.] Precisely so. The contract expressly provides that "the only ground on which the seller is to be excused delivery of *the above* nitrate of soda (that is, the five hundred tons), is, the loss of the said vessel, or that which may be substituted for it, on her homeward voyage." [MAULE, J.—Suppose the John Phillips got ashore and was lost before she reached the port of loading, and suppose she was in fact capable only of carrying three hundred tons,—how much would the defendant be bound to send by another vessel?] Five hundred tons. [CROWDER, J.—In one or more substituted ships?] More than one might in that case be substituted, if necessary. The court will look at the substance of the thing. In *Thornton v. Simpson*, 2 Marsh. 267 (E. C. L. R. vol. 4), 6 Taunt., 556 (E. C. L. R. vol. 1), A. agreed to sell to B. fifty tons of St. Petersburg sound clean hemp, at 59*l.* per ton, to be shipped from St. Petersburg in June or July next, and the ship's name declared as soon as known. If the ship should not arrive by the 31st of December, the contract to be void. On the 5th of September, A. gave B. notice that fifty tons were shipped in the *Lively*, but, on the

20th, he claimed the right (which B. denied) of supplying the deficiency, if any, from another ship. The *Lively* arrived on the 20th of September with forty-four tons, twenty only of which were delivered to B., the rest being shipped at St. Petersburg to other persons. The remaining thirty tons arrived in another ship on the 4th of October. It was held,—first that A. was not confined by the contract to one ship,—secondly, that the notice of the 5th of September having proceeded on *345] *mistake, he was not precluded from supplying the deficiency by another vessel,—thirdly, that he was only bound to deliver to B. from the *Lively* so much as was ascribed to B. [MAULE, J.—It may be that this is a contract to deliver the five hundred tons by the *John Phillips* if practicable; but not to exempt the defendant from performing the contract at all, if he could not perform it by the *John Phillips*.] *Cross v. Elgin*, 2 B. & Ad. 106 (E. C. L. R. vol. 22), has a considerable bearing upon this question. There, the plaintiffs agreed to purchase of the defendants “*about 300 quarters, more or less,*” of foreign rye, shipped on board the *Anna Elizabeth* at Hamburg, at a certain price, subject to the vessel’s safe arrival with the rye on board, and being unsold at Hamburg. The ship brought 350 quarters, and the defendants refused to deliver any part unless the plaintiffs would accept the whole. The plaintiffs abandoned the contract, and brought an action to recover back a sum of money which they had paid for 300 quarters. It was held, by Lord Tenterden and Littledale, J., that, by the word “*about,*” and “*more or less,*” the parties could not be taken to have contemplated so large an excess as fifty over 300 quarters; and by Parke, J., and Patteson, J., that, at all events, it lay on the defendants to show that such an excess above the quantity named was in contemplation, and if, from the obscurity of the contract, they were unable to do so, their defence failed. And the court seem to have thrown out,—which is contrary to what is said in *Moore v. Campbell*, 10 Exch. 323,†—that evidence of mercantile men as to the effect of the words “*about,*” and “*more or less,*” in such a contract, was inadmissible. Lord Tenterden says: “It is said that the effect of the words ‘*more or less*’ was limited by the capacity of the vessel mentioned: and, if any expression had been used, importing that the plaintiffs were to receive all that *346] could come by that vessel, or the whole *cargo of that vessel, the suggestion might have had great weight. But this is left quite uncertain.” And what Mr. Justice Littledale there says has a considerable bearing. He says,—“In construing a conveyance or devise of land, if any ambiguity arises as to the thing which is to pass, it is usual to take as a guide the first description of the subject-matter. The first description here of the thing to be purchased, is, 300 quarters of rye.” So, here, the first description of the thing sold, is, 500 tons of nitrate of soda. And nothing that follows at all controls that.

Tomlinson, contra.(a)—There is no warranty here that the John Phillips shall be capable of carrying the whole five hundred tons contracted for. [JERVIS, C. J.—That is an answer to the argument so far as regards the second count.] The agreement is to be construed by reference to the words that are found within its four corners. No doubt, if it had stopped at the first sentence, that would have been an absolute contract for 500 tons, or some close approximation to that quantity. But it goes on to show that something more is meant. It is a contract for something to arrive by a ship or ships. That would be subject to the double contingency of the ship's arrival, and her arrival with the contemplated cargo on board. Then it goes on, "It is understood that the *above nitrate of soda is to form the full and complete cargo of the John Phillips, 845 tons register,"—con- [*347] scending for the first time upon something certain. This shows the reason for the insertion of "about." Why is the registered tonnage of the ship mentioned? To show that the quantity contracted to be sold is, what the ship will contain. The parties know that the John Phillips is of 845 tons register; and they suppose, from the ordinary relation of a ship's actual capacity to her registered tonnage, that she will contain about 500 tons of the commodity in question: therefore they contract for what they judge will be the full and complete cargo of that particular ship. The reference to the register is evidently for the express purpose of excluding a warranty. Provision is made for the loss of the John Phillips either before or after the time for receiving the cargo; but none is made for her incapacity to carry the quantity mentioned. "In the unexpected event of the John Phillips getting ashore, or being unable to prosecute her voyage from any casualties of the sea, then the seller agrees to deliver and the buyer agrees to take, in lieu thereof, another cargo or cargoes of about equal quantity." [MAULE, J.—Equal to what?] That is left in doubt: it is loosely provided, because neither party expected that the John Phillips would not arrive. Very little light is derived from the authorities in cases of this sort. The judgments of the several judges in *Cross v. Elgin* show how anxiously the courts labour to discover something certain and definite. If the John Phillips would have carried 600 tons of nitrate of soda, would the defendant have been bound to deliver the excess, or would the plaintiff have been bound to take it? *Johnson v. Macdonald*, 9 M. & W. 600,† also shows how liberally the courts will construe these mercantile instruments. There, the defendant, by a bought and sold note, agreed to sell the plaintiff "100 tons of nitrate of soda, at 18s.

(a) The points marked for argument on the part of the defendant, were,—On the demurrer to the second count of the declaration, "that the defendants only sold such a quantity of nitrate of soda as would form a full and complete cargo of the ship John Phillips, which was supposed to be capable of holding and carrying about five hundred tons; but that the defendant did not warrant that the ship was capable of doing so, and therefore that the second count was bad."

In support of the third plea, "that the contract is subject to an exception of losses by sea-perils, and therefore that the third plea is a sufficient answer to the first count."

*348] *per cwt., to arrive ex Daniel Grant; to be taken from the quay at landing weights," &c.; and, below the signature of the brokers, there was the following memorandum,—“Should the vessel be lost, this contract to be void:” and it was held, that this contract did not amount to a warranty on the part of the seller that the nitrate of soda should arrive if the vessel arrived, but to a contract for the sale of goods at a future period, subject to the double condition of the arrival of the vessel, with the specified cargo on board. So, here, the contract is for the absolute sale of the future cargo of the John Phillips, consisting of “about 500 tons” of nitrate of soda, that being the quantity the vessel named is supposed from her tonnage to be capable of carrying.

Willes, in reply, was stopped by the court.

JERVIS, C. J.—My learned Brothers seem to be of opinion, and I concur with them, that the plaintiff is entitled to judgment. The real construction of the contract arises upon the plea; and that is all that we need deal with. The language of the contract certainly is not free from doubt and difficulty. It begins thus,—“Sold for account of Seymour to Bourne & Co. about five hundred tons nitrate of soda, in bags, of good merchantable quality,” to be ready for delivery before a certain day, at a certain price. It then proceeds to show that the stipulated quantity of nitrate of soda is to come from abroad, and to be delivered out of a ship. It then goes on to say,—“It is understood that the above nitrate of soda is to form the full and complete cargo of the John Phillips, 345 tons register, now on her passage to Sydney, to proceed thence without undue delay to the West Coast of South America, there to load the above.” On the one hand, it is contended *349] that the contract is an absolute contract for the sale of five hundred tons, within a reasonable limit. On the other side, it is insisted that it is for “the full and complete cargo of the John Phillips,” and if, contrary to the expectation of the parties, the John Phillips will not carry that quantity, the vendor is released from his contract quoad the excess beyond such full cargo. I do not think the latter is the true construction of the contract. The buyer is entitled to the benefit of the hull of the John Phillips to carry the cargo. If any quantity is put on board of her, or of a vessel substituted for her under the terms of the contract, and the John Phillips or such substituted vessel is lost on her homeward voyage, in that case, and in that case only, the seller is to be excused the delivery, and the contract is to be at an end. But then there is this provision, which seems to me to show that it is the five hundred tons that is the subject of the sale, and not the cargo of the John Phillips only,—“In the unexpected event of the John Phillips getting ashore, or being unable to prosecute her voyage from any casualties of the sea, then the seller agrees to deliver, and the buyers agree to take, in lieu thereof,”—that is, of the five hundred tons contracted to be delivered,—“another cargo or cargoes

of about equal quantity, to be named at the earliest practicable period prior to arrival off the coast; the nitrate of soda so substituted being liable to all the conditions of this contract." That clearly cannot mean equal quantity, to be measured or ascertained by the capacity of the John Phillips, but equal to the quantity stipulated for at the beginning of the contract, viz. five hundred tons. The expression "another cargo or cargoes" gives us a key to the construction of the instrument, and enables us to say that the subject-matter of the sale is a quantity of about five hundred tons of nitrate of soda, and that the buyer is to have the use of the John Phillips, unless in the event of her loss, for the carriage *of it. Whether or not, in case it had turned out that the John Phillips could carry, and did carry, more than the five [350 hundred tons, the plaintiff would have been obliged to take it, it is unnecessary to say. I think the true construction of the contract is, that the plaintiff is entitled to have five hundred tons, and that the quantity was not to be limited to the capacity of the John Phillips. The parties evidently contemplated that that vessel was capable of carrying "about five hundred tons." For these reasons, I am of opinion that the plaintiff is entitled to our judgment upon both demurrers.

MAULE, J.—I am of the same opinion. This is a mercantile contract made through brokers by means of bought and sold notes. The contract is,—“sold for account of G. Seymour to Messrs. Bourne & Co., about five hundred tons nitrate of soda, in bags, of good merchantable quality, to be ready for delivery before the 31st of December, 1854, at 16*l.* per ton, with a fair allowance for sea-damage, if any. Should the refraction exceed 5 per cent., the surplus to be allowed. To be landed, if required, in the London or St. Katharine's Docks at the expense of the seller. Prompt, three months from final day of landing. Deposit 15 per cent., payable on delivery of dock-weight-notes. Usual London terms and conditions. On any portion which it may suit the buyers to take direct from the ship's side, all saving in expense thereby effected to be allowed, viz. 2*s.* 4*d.* per ton for landing expenses, and three months' rent and interest; the latter at the rate of 5 per cent. per annum upon the invoice amount of such portion.” That is a very detailed bargain for the sale of a subject pointed out in very plain terms, viz. “about five hundred tons of nitrate of soda, in bags, of good merchantable quality.” Afterwards there comes a clause which is introduced by *the words “it is understood,” [351 and which provides that “the above nitrate of soda is to form the full and complete cargo of the John Phillips (345 tons register), now on her voyage to Sydney, to proceed thence without undue delay to the West Coast of South America, there to load the above.” The contract then goes on to provide for the substitution of “another cargo or cargoes of about equal quantity,” in the event of the John Phillips

getting ashore, or being unable to prosecute her voyage, from any casualties of the sea. It then concludes,—“The only ground on which the seller is to be excused delivery of the above nitrate of soda, is, the loss of the said vessel (or that which may be substituted for it) on her homeward voyage: in which case, this contract is to be considered void, but in no other event whatever.” Having made a complete contract of sale, the parties proceed to expand and to add terms thereto not to vary the quantity of nitrate of soda which is the subject of the sale, but, inasmuch as in certain events, the contract is not intended to be enforced, they mention the *John Phillips*, which, being of the registered tonnage of 345 tons, both parties believe to be capable of carrying about five hundred tons of the commodity in question. They provide for the event of the loss of the *John Phillips* before loading, and also for the loss of the *John Phillips* or the substituted ship after loading: but there is no provision for the event, which was not expected to happen, of the *John Phillips* not being able to carry five hundred tons of nitrate of soda. They might have provided for that, but they do not. They speak of the *John Phillips* as a vessel by which it was competent to furnish the full amount of the contract. If the parties had intended a different quantity to be delivered in the event of the *John Phillips* not being able to carry the full and complete quantity of five *352] hundred tons, they would probably have provided for *the case of her being able to carry more than the five hundred tons, as well as less: but this they have not done. The contract is for five hundred tons of nitrate of soda, which is to be sent by the *John Phillips* if she can carry it; if not, it is still a contract for five hundred tons, which the seller is to deliver at all events, except in the event provided for, viz., the loss of the *John Phillips* or the substituted ship on her homeward voyage. In truth, it is just the same as if all about the *John Phillips* were struck out of the contract. It is not said what shall happen if the *John Phillips* should be incapable of carrying the whole quantity stipulated for. In my opinion, the defendant would be excused, if from any circumstance the *John Phillips* should be incapable of carrying the whole quantity, from performing his contract by that vessel. This is an absolute contract for the delivery of a certain quantity of merchandise which the defendant might have delivered, and for the non-delivery of which he has no excuse.

CRESSWELL, J.—I remember seeing somewhere a dictum of Lord Kenyon, that underwriters and assured perfectly understood the contract at the time of entering into it, but differed about its construction whenever it came to be enforced. I acquit the parties of that in this case; for, I do not think they did understand this contract; and I am quite sure that I cannot. I arrive at the conclusion that my Lord and my Brother Maule have arrived at, because I find it impossible to come to any other conclusion from the language the parties have used. The

contract is for the sale of "about 500 tons of nitrate of soda;" and we may infer that the intention of the parties was that the John Phillips should be employed to bring it home, and that the buyer should have the full benefit of that ship for that purpose. There was, however, no warranty that the whole should come *by the John Phillips. It was agreed that the John Phillips should be fully [*353 laden with it; but there is no absolute engagement that she should be able to carry or should carry the whole 500 tons. This view is confirmed by the stipulation, that, in the event of the loss of the John Phillips before taking the nitrate of soda on board, the seller shall deliver an equal quantity by a substituted ship or ships. There is great weight in the argument urged by Mr. *Tomlinson*, that, in the event of the loss of the John Phillips before her arrival on the West Coast of South America to take the cargo on board, 500 tons was to be the absolute quantity: but that rather tends to show that the parties were contracting for 500 tons. I think we are bound to hold this to be a contract for that quantity.

CROWDER, J.—I am of the same opinion. The question is, whether this is a contract for five hundred tons of nitrate of soda, or for "the full and complete cargo of the John Phillips." If the word "about" had not been found in the sold-note, I think nobody could have entertained a doubt that this was an absolute contract for the delivery of the five hundred tons. It has been contended that the word "about" was inserted with reference to the subsequent stipulation that "the above nitrate of soda" was to form the full and complete cargo of the John Phillips. But, upon consideration, and bearing in mind the numerous contracts in which the word "about" has been held equivalent to "more or less," I cannot adopt that view. Though the parties seem evidently to have contemplated that the John Phillips would be able to bring home the whole quantity stipulated for, there is no actual engagement on the one side to buy and on the other to sell only so much as she would contain. I agree with my Lord and my Brother Cresswell in thinking that the subsequent words as to what shall happen if the *John Phillips gets ashore, strengthens this argument. I cannot [*354 understand that any other meaning is to be given to the words, than that the defendant is to deliver five hundred tons, and that the John Phillips, which is supposed to be large enough to carry that quantity, shall be employed for that purpose; but that the defendant's contract is not performed by the delivery of four hundred tons, if four hundred tons is all that the John Phillips can carry.

Judgment for the plaintiff.

BRIANT and Another v. PILCHER. *May 30.*

To a count upon an absolute contract by the defendant to indemnify the plaintiffs, his tenants, against the consequences of the non-payment of his rent to the superior landlord, alleging for breach, that, the rent being in arrear, the plaintiffs' goods were seized by the superior landlord,—the defendant pleaded, that, at the time of the distress, more was due from the plaintiffs to the defendant for rent, than the amount distrained for as in the declaration alleged:—Held, no answer to the action,—the payment of their rent by the plaintiffs not being a condition precedent.

THE first count of the declaration stated, that, before and at the several times of the defendant's promise and of the distress thereafter respectively mentioned, the defendant was tenant to The Governors of Christ's Hospital of certain premises, at a certain yearly rent payable by the defendant to the said Governors of Christ's Hospital, and in consideration that the plaintiffs would become tenants to the defendant of a portion of the said premises, at a certain yearly rent, the defendant promised the plaintiffs, during the continuance of the said tenancy of the plaintiffs, to indemnify and save harmless the plaintiffs against the payment of the said rent so payable by the defendant as aforesaid, and against any distress, costs, or charges that might be made or incurred by reason of the non-payment thereof: Averment, that the plaintiffs, relying on such promise, became tenants to the defendant of the said portion of the said premises *at the said *855] yearly rent; and that the said last-mentioned tenancy continued for a long time, to wit, hitherto; yet that, although they had done everything, and all things had happened, to entitle the plaintiffs to a performance by the defendant of his promise, the defendant did not nor would, agreeably thereto, during the continuance of the said tenancy, indemnify or save harmless the plaintiffs as aforesaid; and that, by reason thereof, afterwards, during the continuance of the said tenancies of the defendant and the plaintiffs respectively, and before the commencement of this suit, a distress was made by the said Governors of Christ's Hospital on certain goods and chattels of the plaintiffs then being on the said premises so held by the plaintiffs, for a certain sum, to wit, 133*l.* 11*s.* 10*d.* then due and in arrear to the said Governors of Christ's Hospital for and in respect of the said yearly rent so payable by the defendant, and by reason thereof the said goods and chattels of the plaintiffs were sold to defray and satisfy the said arrears of rent, and a large sum, to wit, 17*l.* 8*s.* 6*d.*, for costs and charges of the said distress, and the plaintiffs by reason thereof were deprived of their said goods and chattels, being of great value, to wit, 200*l.*, and were also greatly annoyed and inconvenienced and hindered in carrying on their business, and injured and damnified in their credit, and in the estimation of their neighbours.

Second plea,—That, at the times of the alleged distress, more was due from the plaintiffs to the defendant for and in respect of the rent

of the said portion of the said premises held by the plaintiffs of the defendant, than the rent distrained for as in the first count alleged, and that the plaintiffs before and at the time of the said distress had neglected and refused to pay the defendant such rent so due to him.

To this plea the plaintiffs demurred, the grounds of demurrer stated in the margin being "that the plea seeks to excuse the defendant's breach of contract by *reason of the plaintiffs' non-payment of rent, though the contract to save harmless is unqualified; and [*356 that the due payment of rent by the plaintiffs is not a condition precedent to the defendant's liability to perform his promise." Joinder.

Honyman, in support of the demurrer.—The plea is no answer to the action. The declaration is founded upon an *absolute* contract to indemnify. The defendant seeks to set up as an answer the non-performance by the plaintiffs of a condition precedent, viz. the non-payment by them of the mesne rent due to him. This he clearly has no right to do. Even if the contract had been, that, the plaintiffs "paying their rent," the defendant would indemnify them against the consequences of the non-payment of his rent to the superior landlords, the plea would be no answer. In *Dawson v. Dyer*, 5 B. & Ad. 584 (E. C. L. R. vol. 27), premises were demised for a term, at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days: the lessee covenanted to pay the rent, and the landlord covenanted that he *paying the rent* at the appointed times, should quietly enjoy, &c.: and it was held, that the lessee, having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued the rent had been in arrear more than twenty-one days; for, that the payment of rent was not a condition precedent to the performance of the covenant for quiet enjoyment. And Parke, J., said: "The proviso in the present case is introduced to reserve a power to the landlord on the particular occasions specified; if he, or any person claiming under him, enters on the tenant except by virtue of that power, the landlord is liable on the covenant for quiet enjoyment." [JERVIS, C. J.—The plea lays no foundation for the averment; it does not allege that there is any condition in the contract upon which the plaintiff declares.]

**Lush*, contra.(a)—It is quite clear that the defendant might [*357 himself have distrained for the rent due to him from the plain-

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the plaintiffs were not damaged within the meaning of the promise, by being distrained upon by the superior landlords, instead of by the defendant, for an amount due from the premises not exceeding the rent due from the plaintiffs, and that the permitting such distress was no breach of the contract to indemnify.

"2. That the defendant is at liberty to ratify the distress, and to cause it to enure as a distress for the rent due from the plaintiffs to him.

"3. That the plaintiff should have paid the rent claimed by the superior landlords before the distress was put in, which payment would have been a payment of the rent due from them, and, not having done so, the distress was occasioned by their own default."

tiffs. It is distinctly alleged in the plea, that at the time of the alleged distress of the plaintiffs' goods, more was due from them to him in respect of rent, than the rent distrained for by the Governors of Christ's Hospital. Under these circumstances, the defendant would have a right to adopt the distress made for his benefit. [MAULE, J.—Clearly not, unless the distress was actually made on his account.] A man is not bound to avow in the same right as that in which a distress is made. He may distrain in one name, and avow in another. [MAULE, J.—He may, for instance, distrain damage feasant, and avow for heriot-service. An act, to be susceptible of ratification, must be done at the time on the behalf of the person who affects to ratify it.] The question is, whether it is not to be implied as a condition in the contract declared on, that the plaintiffs should have paid their rent to the defendant. [JERVIS, C. J.—I cannot say it is.]

Per Curiam.—The plaintiffs must have judgment, the plea being clearly no answer. Judgment for the plaintiffs.

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*ARMSTRONG v. BOWDIDGE. June 1.

A local act of 6 G. 4, c. clxxix., for the management of the poor of Brighton, by s. 204, empowered the directors and guardians, when and as they should find it necessary, to alter, enlarge, extend, and repair the existing poor-house, or to erect other houses or buildings for the better receiving, employing, and maintaining the poor: and s. 220 provided that all contracts or agreements made between the directors and guardians and any other person or persons relating to "any act, matter, or thing to be done in pursuance of that act," should be reduced into writing, and signed by the parties thereto. By the poor law act of 7 & 8 Vict. c. 101, the commissioners are for the first time empowered to direct that schools shall be built in parochial districts:—

Held, that a contract made by the directors and guardians, by order of the poor law commissioners, in relation to the erection of an industrial school within the parish, was not a contract for "a thing to be done in pursuance of the local act," and therefore was not required by the 220th section of that act to be in writing.

THE following case was stated, by consent of the parties, and by order of Williams, J., under the provisions of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 179, for the opinion of the court, without any pleadings.

The defendant is sued as and being one of the directors and guardians of the poor of the parish of Brighton, duly appointed under and in pursuance of the local act, 6 Geo. 4, c. clxxix., a copy of which accompanied and was to be taken as part of this case.

By an order of the poor law board, dated the 4th of February, 1844, —after reciting that it was expedient that the said directors and guardians of the poor should purchase certain pieces of land, and build a workhouse and school thereon, respectively, as thereafter mentioned, —it was ordered and directed, with the consent of a majority of the said directors and guardians of the poor of the said parish, testified in

writing at the foot of a duplicate of the now stating instrument, and in pursuance of the powers given in and by the statutes in that behalf made and provided,—First, that the said directors and guardians should purchase of the owner or owners of the same, the pieces of land described in the margin thereof, marked A. and B., for a sum not exceeding 4205*l.*, which land should be duly conveyed to or in trust for the said directors and guardians,—Secondly, *that the said direc- [*359 tors and guardians should, within twelve calendar months from the date thereof, build, or cause to be built, upon the said piece of land marked A., a workhouse for the use of the said parish, of a size sufficient to hold seven hundred persons, men, women, and children, properly classified; and also build, upon the said piece of land marked B., a school for the pauper children of the said parish, of a size sufficient to hold three hundred children, properly classified; such workhouse and school to be built according to such plans as the said poor law board should approve (such approval to be testified by some writing under their seal), subject, nevertheless, to such modifications thereof as the poor law board might thereafter direct,—Thirdly, that the cost of the building such workhouse and school should not exceed the sum of 20,000*l.*”

In pursuance of this order, and of the powers vested in them, the said directors and guardians advertised for designs for the workhouse and schools, and the following is a copy of the advertisement issued:—
“Parish of Brighthelmston. To architects and others.

“The directors and guardians of the poor of the parish of Brighton are desirous of procuring plans, specification, and estimate, for the erection of a properly-classified workhouse, infirmary, fever wards, and chapel, to accommodate seven hundred adult paupers, proposed to be built on land situate between the reservoir and the race-stand, in the said parish. The design to be so arranged, that any future addition may be made to the buildings with facility. Also, plans, specification, and estimate for industrial schools, to accommodate three hundred children, proposed to be built on land being part of the Warren Farm, in the parish of Rotheringdean, and about one mile east of the race-stand.

“The directors and guardians will award to the author (in their judgment) of the best design for the *workhouse the sum of 70*l.*, [*360 and to the author of the best design for schools the sum of 30*l.* (subject to the same respectively being approved by the poor law board, and their seal affixed), and to the author of the second best design for the workhouse 30*l.*, and to the author of the second best design for the schools 20*l.* Designs for which premiums may be awarded will become the property of the directors and guardians, who will not bind themselves to employ the author to carry out the contemplated works.

“Plans of the sites, and printed particulars, may be obtained on application at my office, on and after the 26th of August, instant; and

any further information which may be required will be furnished by Mr. G. Maynard, surveyor to the directors and guardians.

"Designs must be deposited at the parochial offices, Church Street, Brighton, free of all expenses, on or before the 1st of October next, marked with an emblem or motto, and accompanied by a sealed note having the same emblem or motto on the outside, and enclosing the name and address of the author. The designs not approved of will be returned to the authors, on application.

"By order of the committee,

"ROBERT BECHER, Clerk.

"Board Room, Parochial Offices, August 28d, 1853."

In consequence of this advertisement, several designs were sent in for the workhouse and industrial schools; and the design of Mr. H. H. Collins, architect, was selected by the directors and guardians, for the schools. With the design, the architect sent the following estimate of cost. "The building will cost, exclusive of enclosing walls, and with slight alterations, the sum of 5000*l*."

The designs for the schools, with the estimate, were submitted to the
 *361] poor law board; and, after some *alterations required by them, were approved, and ultimately received their seal. The said Mr. Collins was thereupon appointed by the said directors and guardians, their architect to superintend the erection of the said schools.

The following advertisement was afterwards issued, for tenders, by the directors and guardians:—

"Parish of Brighton. To builders and others.

"The directors and guardians of the poor of the parish of Bright-helmston are willing to receive tenders for the erection of a workhouse on a plot of land situate between the reservoir and the race-stand; also tenders for the erection of industrial schools on land east of the race-stand, being part of the Warren Farm.

"Persons desirous to tender for the workhouse are requested to communicate with the architect, Mr. R. C. Carpenter, 4 Carlton Chambers, Regent Street, London; and persons desirous to tender for the industrial schools are requested to communicate with the architect, Mr. H. H. Collins, 34 Montague Place, Bedford Square, London, on or before Monday, the 3d of April next; and should send their names and addresses to the respective architects. Information in regard to the sites may be obtained at the parochial offices, Church Street, on application to Mr. G. Maynard, surveyor to the directors and guardians.

"Separate sealed tenders to be delivered at my office on or before Saturday, the 15th of April next, not later than 2 o'clock in the afternoon, endorsed respectively, 'Tender for the erection of a Workhouse,' and 'Tender for the erection of Industrial Schools.' Each tender must be accompanied with a sealed note, containing the names of two sureties who will be willing to enter into a bond for the due performance of.

the work. The plans, specifications, &c., can be seen at the office of the respective architects.

*"The directors and guardians will not bind themselves to accept the lowest or any tender, either for the 'Workhouse' or 'Industrial Schools.' By Order. ROBERT BECHER, Clerk. [*362

"Parochial Offices, Church Street, March 27, 1854."

The usage is, for architects to employ a surveyor to take out the quantities, and for the successful competitor to add to his contract the surveyor's charges.

Mr. Collins, the architect, whose residence is in London, employed the plaintiff, whose residence is in Calthorpe Street, Gray's Inn Road, and whose profession is that of surveyor, to take out the quantities from the plans and specifications for the schools, and make out copies of them for the lithographers, to be lithographed for the use of the builders who proposed to tender for the performance of the works. This was done by the plaintiff in conjunction with a surveyor appointed by the builders.

The quantities so taken off were lithographed and used by the builders, and in due course several tenders were sent in for the performance of the works in the erection of the schools; the lowest of which being 13,600*l.*, and more than the directors and guardians had power to expend, they declined to accept either of the tenders.

In the month of August, 1854, the directors and guardians received the following claim from the plaintiff, which is for taking the quantities in conjunction with the builder's surveyor.

"The Directors and Guardians of the poor of the parish of Bright-helmston

"1854. To Robert Wm. Armstrong, Dr.

"April. To services rendered in taking off the quantities from the plans and specifications for the proposed Industrial Schools, Mr. *H. H. Collins, architect, bringing same into bills, and making out four copies of the several trades for the lithographers, say 1½ per cent. on the amount of the lowest tender 204 0 0 [*363

"£204 0 0"

For the purpose of submitting this case to the court, it has been admitted, that, if the directors and guardians are liable to pay anything to the plaintiff, the sum of 204*l.* is the amount to be paid: but the directors and guardians contend that the plaintiff cannot recover, for want of a contract in writing, under the 220th section of the local act, 6 G. 4, c. clxxix.

The question for the opinion of the Court is, whether the plaintiff is, by the operation of the said 220th section of the Brighton Local Act, 6 Geo. 4, c. clxxix., disentitled to recover his claim in this action.

Lush (with whom was *Quain*), for the plaintiff.(a)—The question in this case turns upon the construction of certain clauses of the Brighton Improvement Act, 6 G. 4, c. clxxix., an act for the better regulating, paving, improving, and managing the town of Brighton, and the poor thereof. The act contains two sets of clauses, for establishing and regulating a board of commissioners and a board of guardians. Those relating to the latter commence with s. 199, which provides for the *364] appointment by the vestry of directors and guardians. Section 200 enacts that certain persons shall be ex officio directors and guardians. The 203d section enacts “that the land conveyed to the directors and guardians by that name, or to any of them individually, or to any person or persons in trust for them, and on which the poor-house is erected, or conveyed for any of the purposes of the recited act of 50 G. 3, c. xxxviii., and also all lands, tenements, or hereditaments which shall be conveyed to the directors and guardians to be appointed by virtue of this act, or to any person or persons in trust for them, shall be vested in the directors and guardians for the time being acting under and by virtue of this act, to hold to them and their successors, and the said directors and guardians shall be a body corporate for that purpose.” By s. 204, the directors and guardians are empowered, when and as they find it necessary, to alter, enlarge, extend, and repair the poor-house, &c. By s. 205, they were empowered to purchase land for the purpose of enlarging the poor-house, and for the erection of other buildings for the use of the Poor. Section 215 provides for the appointment and remuneration of officers and servants. Section 217 enables the directors and guardians to sue and be sued in the name of the treasurer. The 220th section enacts “that the said directors and guardians may contract and agree to and with any person or persons for furnishing or supplying all or any part of the articles, provisions, clothing, materials, utensils, or implements requisite for providing, maintaining, or employing the poor of the said parish, for any time not exceeding one year; and all contracts or agreements made or entered into by or between the said directors and guardians and any other person or persons whomsoever, relating to any act, matter, or thing to be done in pursuance of this act, shall be reduced into writing, and signed by the parties thereto, *365] and shall be good, valid, and binding, as well upon the said directors and guardians as upon all other parties thereto, his, her, or

(a) The points marked for argument on the part of the plaintiff, were,—“first, that a writing was not necessary by the 6 G. 4, c. clxxix., to the validity of a contract, or to a right of action against the directors and guardians,—secondly, that the works in respect of which the action was brought were not works authorised by, or within the scope of, the statute.”

their executors, administrators, or assigns; and, in case of breach thereof, actions and suits may be brought, maintained, and defended, and damages and costs be recovered thereon against the party or parties refusing or neglecting to perform the same." And the 221st section provides "that the said directors and guardians shall cause all the receipts, payments, debts, and credits, and all acts, proceedings, orders, regulations, matters, and things relating to the execution of the powers vested in them by this act, to be fairly written and entered in a book or books to be kept for that purpose, and which book or books shall be signed by the chairman, or by some three or more of the directors and guardians present at the meeting when such proceedings are passed, and also by the clerk or one of the clerks to the said directors and guardians, or the person attending on his or their behalf; and all entries so made, and true and attested copies thereof, and also all books kept by the said directors and guardians by virtue of the said recited act of 50 G. 3, c. xxxviii., and made evidence thereby, shall be admitted in evidence in any court whatsoever, in all causes, suits, or actions to which the same shall relate." There is nothing in this act to enable the directors and guardians to build *schools*; nor did any other act at that time authorize them to do so; neither was such authority conferred upon guardians of the poor by the general poor law amendment act of the 4 & 5 W. 4, c. 76; on the contrary, their powers to build or enlarge workhouses were taken away by that act. The 7 & 8 Vict. c. 101, for the first time conferred the power of building school-houses. The 40th section enables parishes and unions, within certain prescribed limits, to combine for the formation of school-districts. The 42d and 43d sections provide for the constitution *and regulate the powers and [*866 duties of district boards,—the latter enacting "that every such district board shall have such of the powers of guardians for the relief and management of the poor within any school or asylum, and for the appointment, payment, and control of paid officers, as the said commissioners may direct; and the legal and reasonable orders of such district board shall be obeyed and obedience thereto enforced in the same manner and by the same remedies and penalties as the legal and reasonable orders of guardians; and it shall be lawful for the said commissioners, with the consent in writing of a majority of any district board, to direct such district board to purchase or hire or build, and to fit up and furnish, a building or buildings, of such size and description, and according to such plan, and in such manner as the said commissioners may deem most proper, for the purpose of being used or rendered suitable for the relief and management of the poor to be received into such school or asylum." And s. 44 enacts, that, "for the purpose of providing a building for such school or asylum, it shall be lawful for such district board, subject to the order of the poor law commissioners, to exercise the powers given to boards of guardians by the 4 & 5 W. 4, c.

76, or any other act or acts, for the purchase and hire of lands and buildings, and to borrow, in like manner as is provided in the said first-recited act, or in any other act or acts, such sum or sums of money as may be necessary for the purpose of purchasing any site, or purchasing, hiring, or building, or of fitting up and furnishing such building or buildings as aforesaid, and to charge the future poor-rates of the parishes or unions, or parishes and unions so combined as aforesaid, with the payment of such sum or sums of money, and interest thereon." And s. 45 enacts that every such district board shall be enabled to accept, take, and hold, on behalf of the district for which they *act, *367] any lands, buildings, goods, effects, or other property, as a corporation, and in all cases to sue and be sued as a corporation. Assuming, that, under the 220th section of the local act, a contract made by the directors and guardians for the supply of provisions for the poor would not be valid unless in writing, that section can have no application to the particular matter which is the subject of this agreement. This is not a contract "relating to any act, matter, or thing to be done in pursuance of" the local act. It is a thing which the directors and guardians had no power to do under the local act. [MAULE, J.—Section 220 does not provide for the *power* of contracting, only for the *formality*.] The agreement here is under the 7 & 8 Vict. c. 101. [CRESSWELL, J.—You must show that the directors and guardians can contract without writing. Being a corporation, the directors and guardians can only properly bind themselves by a contract under seal. The 220th section enables them to contract *in writing*, dispensing with a seal.] The 43d section requires no writing. The only question submitted to the court upon this special case, is, whether the plaintiff is disentitled to recover, for want of a contract in writing under the 220th section of the local act. The facts are advisedly omitted.

Creasey, contrà.—The contract in question is one which ought, under the 6 G. 4, c. clxxix., s. 220, to have been in writing. The directors and guardians exist only by virtue of that act: everything that is done by them is done under the act. The most material sections of the local act are the 204th and 205th. The 204th section empowers the directors and guardians, when and as they shall find it necessary, to alter, enlarge, extend, and repair the house already erected for the use of the poor of *368] the parish of Brighton, or to erect such other *houses or buildings for the better receiving, *employing*, and maintaining of such poor; and the 205th section enables them to purchase lands for the purpose of carrying into effect the powers of the 204th section. The 4 & 5 W. 4, c. 76, though it does not expressly provide for the building of schools, recognises the appointment of schoolmasters. [MAULE, J.—The statute also recognises churchwardens; but it does not therefore authorize them to build churches.] If the guardians are to educate the poor, and may enlarge the workhouses for the purpose of obtaining

school accommodation, why may they not have industrial schools erected outside the workhouse? It is true, the schools are created under the 7 & 8 Vict. c. 101; but the expenses are to be defrayed out of the rates collected under the local act. If the directors and guardians act under the combined authority of the two acts, they are still acting under the authority of the local act, and are bound by all the formalities prescribed by it: and, seeing that these formalities were designed for the protection of the inhabitants against reckless and improvident expenditure, it is desirable that they should not be lightly dispensed with. The circumstance of the guardians and directors being set in motion by the poor law commissioners, does not prevent this from being a thing done by them in pursuance of the local act.

Lush, in reply.—Neither the local act, nor any general act, enabled the guardians and directors to build schools at the time the local act passed. The 7 & 8 Vict. c. 101 for the first time enables it to be done under the direction of the poor law commissioners. When the poor law commissioners, under the powers vested in them by the 7 & 8 Vict. c. 101, direct the guardians and directors under the local act to build a school, can it *be said that the school is built *in pursuance of* the [*869 local act?

MAULE, J.—The 220th section of the 6 G. 4, c. clxxix., has a two-fold operation,—first, to prevent the necessity of all contracts entered into by the guardians and directors being under seal,—secondly, to prevent a contract by parol from being set up. That act giving the guardians and directors no power to build a school, there comes an act of the 7 & 8 Vict. c. 101, which by s. 48 authorizes the poor law commissioners to direct the district boards to purchase or build school-houses. In building a school under the direction of the poor law commissioners under that act, I think it is impossible to say that the guardians and directors are acting in pursuance of the local act. I therefore think we are bound to hold that a contract in writing under s. 220 was not necessary in this case.

The rest of the court concurring,

Judgment for the plaintiff.

*370] *PHELPS v. THOMAS PROTHERO, Clerk, and Others,
Executors of THOMAS PROTHERO, Deceased. *June 8.*

A. having sued B. in the Court of Queen's Bench for rents and royalties alleged to be due from B. to A. upon an indenture of lease of the 20th of February, 1840, whereby A. had demised to B. certain mines and veins of coal, &c., at and under certain rents and royalties therein mentioned, and whereby B. had entered into certain covenants with A. for the payment thereof and otherwise, and the action being about to be tried, an agreement was entered into as follows:—"In the Queen's Bench. Between A. plaintiff, and B. defendant. In consideration of your withdrawing the record in this action, I hereby undertake to pay you to-morrow morning the sum of 210*l.* by a check on my bankers, in addition to the sum of 300*l.* for which B. has given his bills at one, two, and three years' date; you hereby undertaking to discharge B. from all further liability to the rents and covenants of the lease which is the subject of this action, upon his assigning to you all his estate and interest in such lease." This was signed "C.," and addressed to "A.," and under it A. wrote and signed the following,—"I accept of the within mentioned terms of settlement, and undertake to perform my part of the within arrangement."

In an action by B. against A. for a breach of this agreement, the declaration alleged the agreement to have been made "between B., by one C., *his agent in that behalf*, and A." It then went on to aver, that, in pursuance of the said agreement, the record in the said action was withdrawn and the 210*l.* paid, and that B. was always ready and willing to do and perform all things on his part to be performed, to entitle him to be discharged by A. from all further liability to the rents and covenants of the said lease, of which A. had notice, and that, before the committing of the grievances, B. offered to assign to A. all his estate and interest in the lease, and requested him to perform the agreement on his part; but that A. refused to do so, and wrongfully discharged B. from making such assignment, and afterwards, in breach of the agreement, charged B. with further liability on the covenants of the lease, and sued him thereon, and recovered judgment, and issued execution thereon.

To this declaration, A. pleaded,—fifthly, that B. did not assign to him all his estate and interest in the said lease.

Twelfthly, that, before the making of the agreement in the declaration mentioned, B. by deed, dated the 24th of March, 1840, demised the said mines and veins of coal, together with the indenture of lease, and all benefit and advantage thereof, to C., for the residue of the term thereby created, wanting one day, with a power of sale in default of payment to C. of 3000*l.* in manner therein mentioned; that, before the making of the agreement in the declaration mentioned, by an indenture of the 25th of March, 1840, B. granted to C. an annuity or yearly rent-charge of 75*l.* charged upon the premises demised by the lease of the 20th of February, 1840; that default was made in payment of the 3000*l.*, and that C., in exercise of the power of sale, sold all the interest in the said mines and veins of coal which he took under and by virtue of the underlease and mortgage of the 24th of March, 1840; that, at the time of the making of the agreement in the declaration mentioned, B. knew of the said sale by C., but that A. had no notice or knowledge whatever of the said underlease and mortgage, or the grant of the annuity to C., or of the said assignment by him in exercise of his said power of sale, or that B. had not full power to assign the said lease of the 20th of February, 1840, and the term thereby created, unaltered and unencumbered; and that B. never assigned, or offered to assign, to A., the said lease in the agreement mentioned, and his estate and interest therein, free from and unencumbered by the said underlease and assignment thereof and the said annuity.

Fourteenthly, that, after the making of the agreement, B. not having assigned his estate and interest in the lease therein mentioned, and the rent and royalties being in arrear, A. sued B. in the Exchequer for the recovery of such arrears and in respect of divers breaches of covenant, and obtained judgment against him; that afterwards, and whilst the said judgment remained unsatisfied, B. filed a bill in Chancery against A. for a specific performance of the agreement, and for an injunction to restrain him from proceeding at law, and for a release from the covenants of the lease; that, after a reference to the master, the Court of Chancery decreed that B. should pay A. a certain sum, that A. should be restrained from proceeding on the judgment so obtained by him, and that certain costs should be paid by A.; that A. paid the costs, and performed the decree; that all the causes of action in the declaration in this cause mentioned existed, and B. had notice thereof, at the time of filing the bill; that the subject-matters of

complaint in this action and in the bill were the same; and that the decree in the suit in equity was a final decree and adjudication between the parties.

Fifteenthly, a similar plea to the fourteenth, under the 83d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, concluding with an averment, that, according to the rules and practice of the Court of Chancery, after such final decree and adjudication so made, A. was, and the defendants, as his executors, were, and would be, entitled to relief on equitable grounds against a judgment if obtained for B. in this action :—

Held,—first, that the action was well brought by B., it being averred, and not denied, that C., in making the agreement, did so as agent and on behalf of B.

Secondly, that the declaration was not bad for want of a specific averment that B. had either immediately or within a reasonable time after the making of the agreement tendered or executed an assignment of his estate and interest in the lease; but that it was enough to allege that he was ready and willing to do so, and to aver generally that he had done all things, and all things had happened necessary to entitle him to maintain the action.

Thirdly, that the fifth, twelfth, and fourteenth pleas afforded no answer to the action.

Fourthly, that the fifteenth plea disclosed no defence to the action upon equitable grounds,—the defendants' remedy, if any, being by application to the court of equity, to restrain the plaintiff from proceeding at law and in equity in respect of the same causes of complaint.

THE declaration stated that the plaintiff, by a writ issued on the 6th of December, 1849, sued Thomas Prothero, and on the 11th of February, 1850, declared *against him in the said action, and afterwards, on the 19th of February, 1850, the said Thomas Prothero demurred in law to the said declaration, and leave was thereupon given to the plaintiff by the court to amend his declaration; and afterwards, and before the making of such amendment, the said Thomas Prothero died, having duly made his last will and testament in writing, and thereby appointed Thomas Prothero, clerk, Charles Prothero, and George Prothero, clerk, executors thereof: And the plaintiff now, in pursuance of the statute in such case made and provided, suggests and shows to the court here, that the said Thomas Prothero, clerk, Charles Prothero, and George Prothero, clerk, now are the acting executors of the said last will and testament of the said Thomas Prothero, deceased; and now, in *pursuance of the said statute, and the said leave of the court, declares against them in the said action as such executors as aforesaid, by amending his aforesaid declaration therein in manner following, that is to say,—For that, at the time of the making of the agreement hereinafter mentioned, an action was pending in Her Majesty's Court of Queen's Bench, at Westminster, in which the said Thomas Prothero, deceased, was plaintiff, and the now plaintiff was defendant, which had been brought by the said Thomas Prothero, deceased, for the recovery of certain rents and royalties alleged to be due to him from the now plaintiff upon an indenture of lease dated the 20th of February, 1840, whereby the said Thomas Prothero, deceased, had demised to the now plaintiff certain mines and veins of coal, with liberty to get the same, yielding and paying to the said Thomas Prothero, deceased, certain rents and royalties therein mentioned, and whereby the now plaintiff had made and entered into certain covenants with the said Thomas Prothero, deceased, for the payment thereof and otherwise: That the said action was about to come on for trial, and the now plaintiff, at the time of the making of the agreement hereinafter mentioned,

had an estate and interest in the said lease, and the said mines and veins of coal,—of which the said Thomas Prothero, deceased, had notice: That thereupon an agreement was made and entered into *between the now plaintiff by one W. S. Cartwright, his agent in that behalf*, and the said Thomas Prothero, deceased, and was signed by the said Thomas Prothero, deceased, and the said W. S. Cartwright as such agent as aforesaid, respectively, which was and is in the words and figures following, that is to say,—“In the Queen’s Bench. 12 August, 1844. Between Thomas Prothero, plaintiff, and W. T. H. Phelps, defendant. In consideration of your withdrawing the record in this action, I hereby undertake to pay you to-morrow *373] ^{*morning} the sum of 210*l.* by a check on my bankers, in addition to the sum of 800*l.* for which the defendant has given his bills at one, two, and three years’ date; you hereby undertaking to discharge the defendant from all further liability to the rents and covenants of the lease which is the subject of this action, upon his assigning to you all his estate and interest in such lease. W. S. Cartwright. Witness, S. Towgood. To Thomas Prothero, Esq.” “I accept of the within-mentioned terms of settlement, and undertake to perform my part of the within arrangement. T. Prothero. Witness, S. Towgood:” That the name and initials “W. S. Cartwright,” in the said agreement, was the name and signature of the said W. S. Cartwright, signed as the agent and on behalf of the now plaintiff; and that the name “Thomas Prothero” therein, was the name and signature of the said Thomas Prothero, deceased; and that the said action and lease in the said agreement mentioned, were the action and lease hereinbefore respectively described: That, in pursuance of the said agreement, the record in the said action was withdrawn, and that the said payment of 210*l.* was made to the said Thomas Prothero, deceased; and that the now plaintiff, from the time of the making of the said agreement, until the committing of the grievances hereinafter mentioned, was always ready and willing to do and perform all things on his part to be performed, to entitle him to be discharged by the said Thomas Prothero, deceased, from all further liability to the rents and covenants of the said lease,—of which the said Thomas Prothero, deceased, had notice; and that the plaintiff, before the committing of such grievances, offered to the said Thomas Prothero, deceased, to assign to him all the estate and interest of the plaintiff in the said lease, and requested the said Thomas Prothero to perform the said agreement on his part, and a reasonable time for such *374] discharge as aforesaid elapsed before the committing of ^{*such} grievances: Yet that the said Thomas Prothero, deceased, did not nor would discharge the plaintiff from such liability, but refused so to do, and therein made default, and wrongfully discharged the plaintiff from making an assignment of the said lease, and refused in any manner to perform such agreement on his the said Thomas Prothero’s part,

and afterwards, wrongfully and in breach of the said agreement, charged the plaintiff with further liability on the covenants of the said lease, and sued the now plaintiff thereon in the Court of Exchequer, for certain alleged breaches by him of the same, and afterwards, by the consideration and judgment of the last-mentioned court, recovered judgment against the now plaintiff in such last-mentioned action, for a large sum of money; and afterwards, wrongfully, and in further breach of the said agreement, issued execution on such judgment, and caused the goods of the now plaintiff to be seized and sold under the same; and also issued on such last-mentioned judgment a writ of *capias* against the now plaintiff; and the plaintiff was put to and incurred great expense in endeavouring to defend himself against the said action, and in relation thereto, and in taking proceedings in Chancery to restrain the said Thomas Prothero from pursuing the same; and the plaintiff lost the said goods so seized and sold as aforesaid, and had been greatly impoverished and injured in his credit and circumstances, and prevented from carrying on his profession of an attorney, and subjected to great pecuniary losses: And the plaintiff claimed 10,000*l*.

Fifth plea,—that the plaintiff did not assign to the said Thomas Prothero, deceased, all his estate and interest in the said lease.

Second replication to the fifth plea,—that the said Thomas Prothero exonerated and discharged the plaintiff from assigning to the said Thomas Prothero all his estate and interest in the said lease.

*The defendants took issue on the second replication to the fifth plea, and also demurred thereto, the ground of demurrer [*375 stated in the margin being, “that the condition upon which alone the said Thomas Prothero, deceased, was to discharge the plaintiff, never existed.” Joinder.

Twelfth plea,—that, by deed, dated the 20th of February, 1840, and made between the said Thomas Prothero, deceased, and the plaintiff, the said Thomas Prothero, deceased, demised and leased to the plaintiff the mines and veins of coal in the declaration mentioned, to hold from the 25th of March then next, for the term of six years, and assigned to the plaintiff a certain vein of coal, lands, and premises, comprised in, and agreed to be let to the said Thomas Prothero, deceased, by one Sir Benjamin Hall, by an agreement in the said deed mentioned to have been made the 20th of April, 1836, together with the same agreement, for all the estate, term, and interest therein of the said Thomas Prothero, deceased; and the said Thomas Prothero did, in and by the said lease, covenant with the plaintiff, his executors, administrators, and assigns, that, if, at the end of the said term of six years, there should be any coal left unworked under certain of the lands mentioned in the said deed, the said Thomas Prothero, deceased, would grant and demise all such unworked coal to the plaintiff, his executors, administrators, and assigns, for the further term of fifteen

years, if the plaintiff should be desirous to rent and take the same on the terms in the said lease mentioned: That the lease in the said agreement in the declaration mentioned, was and is the same identical lease as the said lease in this plea first mentioned: That, before the making and entering into the said agreement, to wit, between the said Thomas Prothero, deceased, and the plaintiff, as in the declaration mentioned, *376] the plaintiff, by deed, dated the 24th of March, 1840, and *made between the plaintiff and one Thomas Cartwright, had demised the said mines and veins of coal, together with the said indenture of lease, and all benefit and advantage of every clause, matter, and thing therein contained, to the said Thomas Cartwright, to hold the same for the term created by the said lease, wanting one day thereof, subject to a certain proviso for redemption of the same, therein contained; with a certain power of sale therein and thereby granted to the said Thomas Cartwright, in case default should be made in payment of the sum of 3000*l.* and interest, in the manner and at the times therein mentioned: and in and by the said deed the plaintiff did assign to the said Thomas Cartwright the benefit of the said agreement with the said Sir Benjamin Hall, and also of the covenant for renewal contained in the said indenture of lease, subject, nevertheless, to the said proviso for redemption, and with the said power of sale: That, before the making of the said agreement in the declaration mentioned, by an indenture made the 25th of March, 1840, between the plaintiff of the one part, and the said Thomas Cartwright of the other part, the plaintiff did give and grant unto the said Thomas Cartwright, for the lives of H. G. Phelps, G. L. Cartwright, and W. S. Cartwright, and the lives and life of the survivors and survivor of them, an annuity or yearly rent-charge of 275*l.* to be issuing and payable out of and from, and to be charged and chargeable upon, the said mines and premises comprised in and demised by the said indenture of lease in the declaration and hereinbefore mentioned; and it was agreed and declared by the plaintiff, in and by the said indenture of the 25th of March, 1840, that the said Thomas Cartwright should stand and be possessed of and interested in the last-mentioned mines and premises upon certain trusts for securing the due payment of the said annuity: *377] That the said W. S. Cartwright in the said *indenture named, was, at the date of the said agreement, and still is living: That default was made in payment of the sum of 3000*l.* and interest; and that, by indenture dated the 1st of July, 1844, the said Thomas Cartwright, in exercise of the said power of sale so granted to him as aforesaid, bargained, sold, assigned, and transferred unto trustees for the Monmouthshire and Glamorganshire Banking-Company, all his, the said Thomas Cartwright's, estate and interest in the said mines or veins of coal which he took under and by virtue of the said indenture of underlease and mortgage of the 24th of March, 1840, freed and discharged from all right of redemption whatsoever: That, at the time of the mak-

ing of the said agreement between the said Thomas Prothero and the plaintiff in the declaration mentioned, the plaintiff knew of the said sale by the said Thomas Cartwright, but the said Thomas Prothero, deceased, had no notice or knowledge whatever of the said underlease and mortgage or grant of the said annuity to the said Thomas Cartwright, or of the said assignment by him in exercise of his said power of sale, or that the plaintiff had not full power to assign the said lease of the 20th of February, 1840, and the term thereby created, unaltered and unencumbered: And that the plaintiff never assigned, or offered to assign, to the said Thomas Prothero, deceased, the said lease in the said agreement mentioned, and his the plaintiff's estate and interest therein, free from and unencumbered by the said underlease and assignment thereof, and the said annuity.

Demurrer to the twelfth plea, the grounds of demurrer stated in the margin, being, "that, by the agreement, the plaintiff was only bound to assign to Thomas Prothero the estate and interest in the lease which the plaintiff had at the time the agreement was made; and that the fact of the same being encumbered, as stated in the plea, is no defence."

*Fourteenth plea,—that, after the agreement in the declaration mentioned had been made between the plaintiff and the said Thomas Prothero, deceased, the plaintiff not having assigned his estate and interest in the said lease mentioned in the said agreement, and certain arrears of the said rents and royalties being due to the said Thomas Prothero, deceased, under the said indenture of lease of the 20th of February, 1840, in the declaration mentioned, the said Thomas Prothero sued the plaintiff in the Court of Exchequer for the recovery of such arrears of the said rents and royalties as aforesaid, and in respect of divers breaches of covenant of the said indenture of lease before then committed by the plaintiff; and that thereupon such proceedings were had and taken in the said action, that the said Thomas Prothero, deceased, obtained judgment against the plaintiff as in his said declaration in this action is mentioned: That the plaintiff thereupon, on or about the 26th of January, 1847, and whilst the said judgment so obtained by the said Thomas Prothero, deceased, against the plaintiff as aforesaid, was unsatisfied, filed his bill of complaint against the said Thomas Prothero, deceased, in the Court of Chancery, being a court of competent authority and jurisdiction in that behalf, for the purpose of obtaining specific performance of the said agreement in the declaration set forth, as well as relief in respect of the alleged breach of the said agreement mentioned in the said bill and in the declaration in this action; and in and by such bill he stated and set forth the said agreement, and the alleged refusal of the said Thomas Prothero, deceased, to discharge the plaintiff from further liability to the rent and covenants of the said lease in the said agreement mentioned; and

prayed that the said Thomas Prothero, deceased, might be restrained by the order and injunction of that court from further proceeding with the said action so brought by him, and then pending in the *Exchequer, against the plaintiff, and from commencing any fresh action or actions against the plaintiff for arrears of rent reserved by the said indenture of lease of the 20th of February, 1840, and that the said Thomas Prothero, deceased, might be decreed to execute to the plaintiff a release or discharge from all further liability to the rents and covenants of the said lease,—the plaintiff thereby offering to assign to the said Thomas Prothero, deceased, all the plaintiff's estate and interest in the said lease, in such manner as that court should direct, and that the said Thomas Prothero, deceased, might be ordered to pay to the plaintiff the costs incurred by him in and about his defence to the said action, and also the costs of that suit: That divers proceedings were had and taken in the said suit; and that the said cause came on to be heard and debated before the said court in presence of counsel for the plaintiff and the said Thomas Prothero, deceased; and the said court did on the 3d of March, 1848, make an order in the said suit, whereby it was referred to one of the masters to make certain inquiries which the court thought fit to direct, with a view to the final adjudication of the matters in and by the said bill alleged and complained of: That the inquiries directed by the said order were made by one of the said masters, and further proceedings were had and taken in the said court in the said suit, and afterwards, on the 18th of March, 1849, the said cause coming on to be debated before the said court in the presence of the counsel for the plaintiff and the said Thomas Prothero, deceased, the said court made a final decree in the said suit, and did in and by such decree, amongst other things, order that the plaintiff should, within a fortnight from that time, pay unto the defendant in the said suit the sum of 100*l.*, the principal due on the bill of exchange in the pleadings in such suit mentioned, together with interest thereon, and thereupon, that an injunction be awarded to restrain the defendant *380] from taking any proceedings under the judgment obtained by him in the action at law in the pleadings mentioned, and from bringing any further actions in respect of the rent of the premises in question in the said cause, and the covenants in the lease mentioned in the agreement entered into between the plaintiff and defendant, bearing date the 12th of August, 1844, in the pleadings mentioned; and that such injunction be made perpetual; and it was referred to the taxing master of the said court to whom the said cause stood referred, to tax the plaintiff his costs of that suit, but the said taxing master was not to allow the plaintiff any costs of three several orders bearing date respectively the 3d of July, 1847, and the 15th of November, 1847, and the 15th of December, 1847; and it was ordered that such costs, when taxed, after deducting the sum of 10*l.*, be paid by the defendant in

that suit to the plaintiff: That the said Thomas Prothero, deceased, paid all the costs allowed to the plaintiff by the taxing master, and in all things obeyed and performed the said decree so made as aforesaid: That all the said supposed causes of action and grievances in the declaration in this cause mentioned, existed, and that the plaintiff had notice thereof, at the time of his filing his said bill against the said Thomas Prothero, deceased, as aforesaid: That the subject-matters of complaint contained in the plaintiff's said bill, and upon which the said decree was so made as aforesaid, were the same as in this action, and the contract in respect whereof the plaintiff sought and obtained relief in and by the said suit was and is the same agreement which is set forth in the declaration in this action; and that the alleged breach thereof complained of in the said suit, was and is the same alleged breach whereof the plaintiff had complained in this action, and not another or different agreement or breach; and that such decree as aforesaid was and is the final decree and adjudication of the said Court of Chancery between the plaintiff and the said Thomas Prothero, deceased, upon and in respect of the said agreement and breach. [*381

Demurrer to the fourteenth plea, the grounds of demurrer stated in the margin, being, "that the proceedings in Chancery upon such a bill of complaint as that mentioned in the plea, are no answer to an action for damages for breach of the agreement; and that the plea shows no defence on equitable grounds." Joinder.

Fifteenth plea,—“upon equitable grounds,”—that after the said agreement in the declaration mentioned had been made between the plaintiff and the said Thomas Prothero, deceased, the plaintiff, not having assigned his estate and interest in the said lease mentioned in the said agreement, and certain arrears of the said rents and royalties being due to the said Thomas Prothero, deceased, under the said indenture of lease of the 20th of February, 1840, in the declaration mentioned, the said Thomas Prothero, deceased, sued the plaintiff in the Court of Exchequer for the recovery of such arrears of the said rents and royalties as aforesaid, and in respect of divers breaches of covenant committed by the plaintiff; and that thereupon such proceedings were had and taken in the said action, that the said Thomas Prothero, deceased, obtained judgment against the plaintiff, as in his said declaration in this action was mentioned: That the plaintiff thereupon, on or about the 26th of January, 1847, and whilst the said judgment so obtained by the said Thomas Prothero, deceased, against the plaintiff as aforesaid, was unsatisfied, filed his bill of complaint against the said Thomas Prothero, deceased, in the Court of Chancery, being a court of competent authority and jurisdiction in that behalf, for the purpose of obtaining specific performance of the said agreement in the declaration set forth, as well as relief in respect of the alleged breach of the said

*382] agreement mentioned in the said bill *and in the declaration in this action; and in and by such bill he stated and set forth the said agreement, and the alleged refusal of the said Thomas Prothero, deceased, to discharge the plaintiff from further liability to the rents and covenants of the said lease in the said agreement mentioned, and prayed that the said Thomas Prothero, deceased, might be restrained by the order and injunction of that court from further proceeding with the said action so brought by him, and then pending in the Exchequer, against the plaintiff, and from commencing any fresh action or actions against the plaintiff for arrears of rent reserved by the said indenture of lease of the 20th of February, 1840, and that the said Thomas Prothero, deceased, might be decreed to execute to the plaintiff a release or discharge from all further liability to the rents and covenants of the said lease, the plaintiff thereby offering to assign to the said Thomas Prothero, deceased, all the plaintiff's estate and interest in the said lease, in such manner as that court should direct; and that the said Thomas Prothero, deceased, might be ordered to pay to the plaintiff the costs incurred by him in and about his defence to the said action, and also the costs of that suit: That divers proceedings were had and taken in the said suit; and that the said cause came on to be heard and debated before the said court in the presence of counsel for the plaintiff and the said Thomas Prothero, deceased; and the said court did, on the 3d of March, 1848, make an order in the said suit, whereby it was referred to one of the masters to make certain inquiries which the court thought fit to direct, with a view to the final adjudication of the matters in and by the said bill alleged and complained of; that the inquiries directed by the said order were made by one of the said masters, and further proceedings were had and taken in the said court in the said suit; and afterwards, on the 13th of March, 1849, the said *383] *cause coming on to be debated before the said court, in the presence of the counsel for the plaintiff and the said Thomas Prothero, deceased, the said court made a final decree in the said suit, and did in and by such decree, amongst other things, order that the plaintiff should, within a fortnight from that time, pay unto the defendant the sum of 100*l.* for principal due upon the bill of exchange in the pleadings in such suit mentioned, together with interest thereon, and thereupon that an injunction be awarded to restrain the defendant in that suit from taking any proceedings under the judgment obtained by him in the action at law in the pleadings mentioned, and from bringing any further actions in respect of the rent of the premises in question in the said cause, and the covenants in the lease mentioned or referred to in the agreement entered into between the plaintiff and defendant, bearing date the 12th of August, 1844, in the pleadings mentioned; and that such injunction be made perpetual; and that it be referred to the taxing master of the said court to whom the said cause stood referred,

to tax the plaintiff his costs of that suit; but the said taxing master was not to allow the plaintiff any costs of three several orders bearing date respectively the 8d of July, 1847, and the 15th of November, 1847, and the 15th of December, 1847; and it was ordered that such costs, when taxed, after deducting the sum of 10*l.*, be paid by the defendant in the said suit to the plaintiff: That the said Thomas Prothero, deceased, paid all the costs allowed to the plaintiff by the taxing master, and in all things obeyed and performed the said decree so made as aforesaid: That all the said supposed causes of action and grievances in the declaration in this cause mentioned, existed, and that the plaintiff had notice thereof, at the time of filing his said bill against the said Thomas Prothero, deceased, as aforesaid: That the subject-matters of complaint contained in the plaintiff's *said bill, and upon which [384 the said decree was so made as aforesaid, were the same as in this action; and that the contract in respect whereof the plaintiff sought and obtained relief in and by the said suit, was and is the same agreement which was set forth in the declaration in this action; and that the alleged breach thereof complained of in the said suit was and is the same alleged breach whereof the plaintiff had complained in this action, and not another or different agreement or breach; and that such decree as aforesaid was and is a final decree and adjudication of the Court of Chancery between the plaintiff and the said Thomas Prothero, deceased, upon and in respect of the said agreement and breach: And that, according to the rules and practice of the Court of Chancery, after such final decree and adjudication so made, the said Thomas Prothero, deceased, was, and the defendants, executors as aforesaid, were, and would be, entitled to relief on equitable grounds against a judgment, if obtained for the plaintiff in this action.

Demurrer to the fifteenth plea, the grounds of demurrer stated in the margin, being, "that the plea does not show any equitable grounds of defence against this action, which is for a different object than the bill of complaint mentioned in the plea was for; and that the decree mentioned in the plea is no bar to an action for damages." Joinder.

Phipson (with whom was *Field*), for the plaintiff.(a)—*The [385 declaration will be objected to, on the ground, first, that the plaintiff is not the proper person to sue upon the agreement, inasmuch

(a) The points marked for argument on the part of the plaintiff, were,—

On the demurrer to the twelfth plea,—“that the plea is bad, on the ground, that, by the agreement, the plaintiff was only bound to assign to Thomas Prothero the estate and interest in the lease which the plaintiff had at the time the agreement was made, and that the fact of the same being encumbered as stated in the plea is no defence.”

On the demurrer to the fourteenth plea,—“that the plea is bad, on the ground that the proceedings in Chancery upon such a bill of complaint as that mentioned in the plea, are no answer to an action for damages for breach of the agreement; and that the plea shows no defence on equitable grounds.”

On the demurrer to the last plea,—“that the plea is bad, on the ground that it does not show any equitable grounds of defence against this action, which is for a different object than the bill

as it purports to be an agreement made between Thomas Prothero and Cartwright. But the declaration alleges, and it is admitted by the demurrer, that Cartwright entered into the agreement as the agent of the plaintiff. It is true, Cartwright agrees to pay a sum of 210*l.* by a check upon his own bankers. But, if he does that for the benefit of the plaintiff, and the plaintiff adopts his agency, there is nothing to prevent the plaintiff from suing; though possibly the party contracted with might have the option of retaining the personal liability of the agent. If Cartwright makes the agreement as agent of the plaintiff, all the consideration practically proceeds from the plaintiff. Then it will be said, that the consideration for Prothero's discharging the plaintiff from the rents and covenants of the lease which was the subject of the action mentioned in the agreement, was, the assignment by the plaintiff of all his estate and interest in the lease to Prothero; and, inasmuch *886] as there is no averment that any *actual assignment had been made, the plaintiff had failed to comply with a condition precedent, and the action was not maintainable. The declaration, it is true, does not show that there has been any actual assignment of the plaintiff's interest; but it alleges that the plaintiff was always ready and willing to do and perform all things on his part to be performed to entitle him to be discharged by Prothero from all further liability to the rents and covenants of the lease,—of which Prothero had notice. That general averment would be sufficient: it is expressly so declared by act of parliament: (a) but the declaration goes on to aver that the plaintiff, before the committing of the grievances, offered to assign to Prothero all his estate and interest in the lease, and requested him to perform the agreement on his part, and that, although a reasonable time for such discharge had elapsed before the committing of such grievances, Prothero refused to discharge the plaintiff. The discharge of the plaintiff from the rents and covenants in the lease, and the assignment by him to Prothero of his estate and interest therein, are concurrent acts, and therefore an averment of readiness and willingness is sufficient: *Rawson v. Johnson*, 1 East, 203; *Wilks v. Atkinson*, 1 Marsh. 412 (E. C. L. R. vol. 4); *Laird v. Pem*, 7 M. & W. 474:† and see the cases collected in the notes to *Peeters v. Opie*, 2 Wms. Saund. 352. It is admitted here that Prothero discharged the plaintiff from making the assignment; and the court will presume a discharge legally operative: see *Brymer v. The Thames Haven Dock and Railway Company*, 2 Exch. 549.† Even if the execution of the assignment were strictly a condi-

of complaint mentioned in the plea was for; and that the decree mentioned in the plea is no bar to an action for damages."

On the demurrer to the replication to the fifth plea,—“that the plea is bad, on the ground, that, under the facts set forth in the declaration, the plaintiff's not having in fact assigned his estate and interest in the lease is no defence to the action; the declaration showing that the plaintiff was under the circumstances discharged from assigning.”

(a) 15 & 16 Vict. c. 76, s. 57.

tion precedent, if he be prevented by the other side from performing it, the plaintiff is discharged: see the notes to *Pordage v. Cole*, 1 Wms. Saund. 319 l.: and see *Ripley v. M'Clure*, 4 Exch. 345;† *M'Clure v. Ripley*, 5 Exch. 140.† Pattenon, J., there says,—5 Exch. 146,†—“The declaration would be good *enough without any averment of readiness and willingness, supposing there were only an averment of discharge, and that averment were traversed and found for the plaintiff.” [*387]

The fifth plea, which merely alleges that the plaintiff did not assign his estate and interest in the lease to Prothero, is idle, if the plaintiff was ready and willing to assign, but was discharged by Prothero from so doing.

The twelfth plea raises a question as to the construction of the agreement declared on. The facts stated in the plea are these,—that, on the 20th of February, 1840, Prothero demised to Phelps the mines and veins of coal in the declaration mentioned, for six years from the 25th of March then next, and also assigned to him his interest in an agreement of the 20th of April, 1836, between himself and Sir B. Hall; that, before the making of the agreement between Prothero and Phelps in the declaration mentioned, Phelps, by deed of the 24th of March, 1840, demised the said mines and veins of coal to one Cartwright, together with the said indenture of lease, subject to a proviso for redemption, and with a power of sale in case of default in the payment of 3000*l.* in manner therein mentioned; that, before the making of the agreement in the declaration mentioned, by indenture of the 25th of March, 1840, Phelps granted to Cartwright an annuity of 275*l.* charged upon the mines and premises comprised in the lease in the declaration mentioned; that Cartwright was still living; that default was made in payment of the 3000*l.* and interest, and that Cartwright, in exercise of his power, sold all his interest in the mines or veins of coal which he took by virtue of the indenture of underlease and mortgage of the 24th of March, 1840, to the Monmouthshire and Glamorganshire Banking Company, freed and discharged from all right of redemption; that, at the time of the making of the agreement between Prothero and Phelps *in the declaration mentioned, Phelps knew of the sale by Cartwright, but that Prothero had no notice or knowledge of the underlease and mortgage or grant of the annuity to Cartwright, or of the assignment by him in exercise of his power of sale, or that Phelps had not full power to assign the said lease of the 20th of February, 1840, and the term thereby created, unaltered and unencumbered; and that Phelps never assigned or offered to assign to Prothero the lease in the agreement mentioned, and his estate and interest therein, free from and unencumbered by the underlease and assignment and the said annuity. The agreement declared on must be construed as a contract on the part of the plaintiff to assign to Prothero his estate and interest [*388]

in the lease such as it was. The defendants cannot, by introducing other matters into their plea, show that the plaintiff undertook to do more than the agreement in terms imports. If the plaintiff were guilty of any fraud, it was open to the defendants to show it by their plea. Unless the necessary construction of the agreement is that suggested by the plea, the plea is clearly a bad one.

The fourteenth plea states in substance, that, after the making of the agreement, the plaintiff not having assigned his estate and interest in the lease therein mentioned, and the rent and royalties being in arrear, Prothero sued him in the Court of Exchequer for the recovery of such arrears and in respect of divers breaches of covenant, and obtained judgment against him; that afterwards, and whilst such judgment remained unsatisfied, the plaintiff filed a bill in Chancery against Prothero for a specific performance of the agreement, and for an injunction to restrain Prothero from proceeding at law, and for a release from the covenants of the lease; that, after a reference to the master, the Court of Chancery decreed that the plaintiff should pay Prothero a *389] certain sum, and *that Prothero should be restrained from proceeding on the judgment so obtained by him, and that certain costs should be paid by Prothero; that Prothero paid the costs, and performed the decree; that all the causes of action in the declaration in this cause mentioned existed, and the plaintiff had notice thereof, at the time of filing the bill; that the subject-matters of complaint in the action and in the bill were the same; and that the decree in the suit in equity was a final decree and adjudication between the parties. All that appears in this plea, that could by any possibility constitute a defence, is this,—that the subject-matters of complaint in the bill in equity were the same as those mentioned in the declaration in this action. The defendants mean to say, that, the question having been once raised and disposed of in the court of equity, it is not competent to the plaintiff to agitate it again. The answer, however, is this, that it appears upon the face of the record that the proceedings here and in equity are not and could not have been the same. This is an action by Phelps against the representatives of Prothero, to recover damages for the breach by Prothero of his contract. He could not have recovered these damages in a proceeding in Chancery instituted for the mere purpose of restraining Prothero from further pursuing his remedy against the plaintiff upon the covenants of the lease.

The fifteenth plea is bad on similar grounds. It professes to be a plea of "equitable defence" under the 83d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, and it winds up with a general allegation, that, according to the rules and practice of the Court of Chancery, after such final decree and adjudication so made, Prothero was, and the defendants, as his executors, were and would be, entitled to relief on equitable grounds against a judgment, if obtained for the

plaintiff in this action. For the reasons before stated, *the causes of complaint in the two courts are not the same; and, if [*390 so, the defendants clearly cannot make out a case for equitable relief. At all events, it lies on the defendants to show that equity would give them relief. No doubt, the court is bound to take notice of the general doctrines of equity. This allegation, however, is a mere conclusion of law, which is not admitted by the demurrer.

Willes, contra. (a)—It appears that Prothero had *brought an [*391 action against Phelps for non-payment of rent and royalties, and for other breaches of covenant; that Phelps had given certain bills; and that Cartwright entered into an agreement with Prothero, under which Cartwright was to pay Prothero 210*l.*, on Prothero's undertaking to discharge Phelps from all further liability to the rents and covenants of the lease which was the subject of the action, Phelps assigning to Prothero all his estate and interest in the lease. The assignment by Phelps must of necessity take place immediately or within a reasonable time after the agreement was entered into: otherwise, he might wait until the day before the expiration of the term, and then offer to assign when the lease had become worthless. The declaration merely avers readiness and willingness on the plaintiff's part. [*Phipson.*—And that Prothero had notice.] Is notice equivalent to a wrongful discharge? [*Jervis, C. J.*—The plaintiff avers that he offered to assign, and that Prothero would not let him.] It is not alleged that anything took

(a) The points marked for argument on the part of the defendants, were,—“That the declaration is bad, because Cartwright should have been the plaintiff instead of the present plaintiff; that the agreement set out in the declaration shows that Cartwright entered into it as a principal, and that it is one which cannot be transferred to the present plaintiff or any other person, Cartwright's personal liability being an essential part of the consideration for the promise or undertaking of the defendants; that the declaration discloses no consideration to support an agreement between the now plaintiff and Prothero,—no benefit to Prothero, or detriment to the plaintiff at Prothero's request; that, if the assigning by the plaintiff of his estate and interest to Prothero was the alleged consideration for Prothero's agreement, the declaration does not show that it was performed; that the assigning of the plaintiff's interest to Prothero was a condition precedent to Prothero's liability, and the declaration does not show performance, or any valid excuse of performance, of such condition precedent; that the averment that Prothero discharged the plaintiff from making an assignment, is unintelligible; that the declaration does not show that Prothero prevented the plaintiff from assigning his estate and interest in the lease; and that the declaration shows no breach by Prothero of his alleged agreement, nor any natural or legal damage from the supposed breach of the agreement.

“That the fifth plea is good, because the assigning by the plaintiff of his estate and interest in the lease was a condition precedent to Prothero's discharging the plaintiff from liability to the rents and covenants of the lease.

“That the second replication to the fifth plea, is bad, because it shows no legal excuse for the plaintiff's not assigning his estate and interest in the lease.

“That the twelfth plea is good, because it shows that the plaintiff did not, and could not, assign to Prothero the plaintiff's estate and interest mentioned in the agreement set out in the declaration; and because it shows that Prothero had no notice of Cartwright's alleged interest in the lease.

“That the fourteenth plea is good, because the demurrer admits the identity of the cause of complaint, and the said Prothero cannot be twice vexed in respect of the same subject-matter of complaint.

“That the fifteenth plea is good, because it shows a good defence on equitable grounds to the cause of action set forth in the declaration.”

place within a reasonable time after the making of the agreement, except the mind of the plaintiff getting into this state of readiness and willingness. The giving up the lease by the plaintiff is to precede his discharge from liability by the plaintiff. For anything that appears, this action may be brought in respect of some matter arising between the time of the offer and the making of the agreement. This is not an *392] agreement *that the plaintiff was competent to sue upon. There is no consideration moving from him. It does not appear that the giving of the bills formed any part of the consideration for the arrangement made on this occasion. Where a party in pleading states evidence, he is bound to state evidence which is conclusive. There is nothing here to show any consideration moving from the plaintiff. It is perfectly consistent with what is stated, that the 210*l.* was the money of Cartwright.

As to the fifth plea, if the declaration is good, it must be conceded that the fifth plea cannot be sustained. The twelfth plea raises in substance the same question that arises on the declaration. If Prothero was absolutely bound to take what the plaintiff had and could assign, and to take it at whatever time the plaintiff chose to give it up, the plea is bad. The fourteenth plea certainly is open to some of the objections urged. But the fifteenth discloses a good equitable defence to the action. Nothing can be more clear than that, where a court of equity decrees specific performance, the parties to the suit in which that decree has been pronounced are conclusively bound by the decision, and are precluded from proceeding at law for damages for a breach of the contract. Thus, in *Reynolds v. Nelson*, 6 Madd. 290, the defendant, after a decree for a specific performance of a contract for the purchase of an estate, to which he submitted, brought an action at law against the plaintiff in equity for damages in not completing his contract within the time specified; and the plaintiff in equity applied for an injunction to restrain the proceedings at law; and the Vice-Chancellor (Sir John Leach) said: "My decree proceeds upon the ground that the defendant had dispensed with the time stated in the contract. If the plaintiff in equity had before the decree applied for an injunction to restrain the defendant from proceeding in an action at law to recover *393] *damages, I should, upon the same principle, have then granted the injunction; and *à fortiori* I must grant it now. The proceeding at law is inconsistent with the decree in equity." So, where there has been a decree for an account, the court of equity will not allow the party to be proceeded against in a court of law: see the cases collected in *Williams on Executors*, pp. 1631 et seq., 1715. The fifteenth plea, at all events, shows an entire and complete identity of the causes of complaint in the action at law and in the suit in equity.

Phipson, in reply.—The true meaning of the agreement declared on, was, that the defendant should be entirely discharged from all future

liability, on payment of the 210*l.*; and the discharge of the plaintiff, and the assignment by him of his estate and interest in the term, were to be concurrent acts. It was, therefore, enough for him to aver, as he has done here, that he was always ready and willing to make such assignment, but that he was prevented and discharged by Prothero from so doing. If the agreement had been under seal, it would have amounted to a release. *Reynolds v. Nelson* is obviously distinguishable. The plaintiff there was going for damages for the omission to do the very thing which the defendant filed his bill in equity against the plaintiff for refusing to permit him to do.

He was then stopped by the court.

JERVIS, C. J.—It has been admitted in the course of the argument in this case, that the points raised by the fifth and twelfth pleas are substantially the same as those which arise upon the declaration, and that the fourteenth plea cannot be sustained.

As to the declaration, two objections were urged against the plaintiff's right to recover. In the first place, it was insisted that Cartwright was the proper *party to sue upon the agreement, and not the plaintiff. I am, however, of opinion, that, under the circumstances [*394 disclosed upon this record, the plaintiff may well maintain the action. It is true, the contract professes to be made by Cartwright, and the consideration appears upon the agreement to be moving from Cartwright only, because he is to pay, by a check on his own bankers, the sum of 210*l.*, in addition to the sum of 300*l.* for which the defendant had given his bills at one, two, and three years' date, and by-gone bills paid by Phelps would form no consideration for the undertaking.^(a) But the declaration alleges that the agreement was entered into by Cartwright as agent and on behalf and for the benefit of Phelps. I think that the contract, being thus made by Cartwright for and on behalf and for the benefit of the plaintiff, may be enforced by the plaintiff, notwithstanding that the agent may for the purposes of the agreement find and provide the money out of his own pocket.

The second objection is, that the plaintiff is not entitled to a remedy on the agreement, or to a discharge from further liability to the rents and covenants of the lease which was the subject of the former action, because he did not immediately upon the execution of the agreement, or within a reasonable time after, assign to Thomas Prothero all his, the plaintiff's, estate and interest in such lease. I do not think it was necessary for the plaintiff to allege it in that form. The agreement is, "In consideration of your withdrawing the record in this action, I (Cartwright) undertake to pay you to-morrow morning 210*l.* by a check on my bankers, in addition to the sum of 300*l.* for which the defendant has given his bills at one, two, and three years' date, you hereby undertaking to discharge the defendant from all liability to the rents and

(a) It would appear from the proceedings in equity that these bills had not been paid.

covenants of the lease which is the subject of this action, upon his *395] "assigning to you all his estate and interest in such lease." I concur with Mr. *Willes*, and with Mr. *Phipson* likewise, that the meaning of the agreement is, that there is to be an entire discharge from liability, not from liability accruing from the date when the surrender or assignment of the lease takes place; but it was intended to make, as it were, a clean sweep of it, and settle, for the consideration stated, all by-gones, as well as to discharge all future liability,—not technically, because, being by parol, it could not have the effect of over-riding covenants in an instrument under seal. But it was intended that there should be no further claim by either party on the other: the agreement giving each corresponding rights,—on the one hand, to have an assignment of the interest,—and on the other hand, contemporaneously with it, a release from all liabilities. And, when the allegation in the declaration is, that the plaintiff, Phelps, has always been ready and willing, with the knowledge of Prothero, to execute such assignment, and further, that he has done everything (according to the recent statutory provision with respect to pleading) necessary to sustain this action,—which may involve the necessity of its being done at once,—I think the plaintiff is entitled to the judgment of the court upon this declaration.

With regard to the fifteenth plea, I am of opinion that there is no foundation for it as setting up an equitable defence. It is attempted to be supported upon one case cited, and a class of cases referred to. It is said to be a well-known rule of equity, that the court will not allow an action to be brought by a creditor in respect of matters which are pending in the suit; upon this ground, that they will not allow the taking of an account, which is being taken for the benefit of all the parties, to be interfered with by the cupidity or the negligence of any *396] creditor who may choose to sue at law for a matter which *is involved in the suit. The case cited by Mr. *Willes* was this. The party having submitted to a decree for a specific performance, on the ground of the time mentioned in the contract being immaterial, sought afterwards to maintain an action upon the contract, upon the ground of the time being material and of the essence of the contract. He could not be permitted thus to blow hot and cold. The case, therefore, has no application. I am of opinion that this plea is no defence, and that the plaintiff is entitled to judgment.

MAULE, J.—I am of the same opinion. It appears to me that the declaration is sufficient, and that the fifteenth plea affords no defence. The true way of construing the agreement, is, to read it so as to effectuate the general intention to be gathered from its terms and the circumstances as they appear upon the record. The intention evidently was, to put an end to litigation between the parties. The plaintiff, Phelps, was not formally a party to the agreement; but the declaration

alleges that it was entered into by Cartwright as his agent and for his benefit. Now, looking at the agreement, there is no doubt it is one which might have been made by Cartwright as the plaintiff's agent. It is averred that it was so; and that averment, in the now state of the record, must be taken to be true. It appears that there was something to be done by Phelps, and something to be done for the benefit of Phelps. Phelps might undertake that Cartwright should pay 210*l.*, or Cartwright might be a party liable to that extent. He might be a surety. But, with respect to the matter sued upon here, that is a thing that was to be done by Prothero for the benefit of Phelps; and the declaration states that he contracted with Phelps by means of this agreement entered into with Cartwright. The first objection, therefore, is answered.

*Then, as to the defence arising out of the liability or the duty of the plaintiff to execute an assignment before he could [*397 maintain any action. This was a contract of that description which might well be allowed to be quiescent until the occasion should arise for doing anything upon it. It is not unusual for an arbitrator to whom matters in difference are referred, after directing certain things to be done by the one party or the other, or by both, to go on and direct that mutual releases shall be executed. What is a reasonable time for a compliance with that direction? Any time at which the party who is to have the release chooses to ask for it. It seldom happens, in practice, that it is ever asked for at all. The award is treated as being as effectual to all intents and purposes as if the formality of executing releases had actually been gone through: and, in the case of an award, it certainly is so. Here, the evident intention of the parties was, not that the thing should be done forthwith, or within any given time, but that it should be done at any time when it should become necessary. If Prothero sues Phelps, then Phelps shall be put in the formal position of being able to say that he is discharged; and, to do that, he must be ready and willing to do what I conceive to be a concurrent act, viz., to transfer to Prothero all his estate and interest in the lease. The declaration avers that he is and always has been ready and willing to assign and transfer all his estate and interest to the defendant. I therefore think that this ground of objection to the declaration also fails.

- As to the fifteenth plea, the defence intended to be set up thereby, is, that the plaintiff has elected to proceed in equity, and therefore cannot go on at law. The cases cited show that the defendant in such a case has not a right unconditionally to stop the action; but that he has a right to say, the court of equity has seisin of the *matter, [*398 and I have a right to restrain you from proceeding at law, because the court of equity has the power of administering complete justice between us. That is a right to be granted and enforced only by a court of equity, and not in this court. The object of giving an equita-

ble jurisdiction to this court was not to interfere in any way with the jurisdiction of the Court of Chancery; but merely, that, in the event of a defendant having some equitable defence to an action here, or of a plaintiff having some equitable answer to a legal defence, such equitable defence or equitable answer might be considered and disposed of here, without putting the parties to the expense and delay of an application to the Court of Chancery for relief in the matter. I think this plea is clearly no answer to the plaintiff's demand.

CRESSWELL, J.—I am of the same opinion. The pleas were all disposed of, or, rather, abandoned, except the fifteenth; and I agree with my Lord and my Brother Maule that that plea discloses no defence on equitable grounds.

With respect to the declaration, it appears to me that the plaintiff may well sue upon this agreement, although it is signed by Cartwright, and although it provides for something to be done by Cartwright, viz., the payment of the 210*l.* by a check upon his own bankers, and he does not profess to sign it as agent. The declaration alleges that Cartwright entered into the agreement as agent and on behalf of the plaintiff. Now, I do not know that an agent may not thus enter into a contract for and on behalf of his principal, although he may do something himself, viz., pay money out of his own pocket: and I think the principal may well sue upon a contract so made by his agent, when the averment that it is so made is not denied.

*399] As to the rest, I agree that the acts to be done by the plaintiff and by Prothero were concurrent acts. The plaintiff was not bound to aver that he tendered and offered to assign his estate and interest in the lease within any particular time. The declaration avers that he has always been ready and willing to do so, and that, before Prothero proceeded to violate the agreement by suing him in the Court of Exchequer, he having offered to transfer all his estate and interest in the lease to Prothero, Prothero refused to perform the agreement on his part.

CROWDER, J.—I am of the same opinion. I think the declaration is good. The action is brought by Phelps; and the declaration contains a distinct averment that the contract which is set out was entered into by Cartwright as his agent and on his behalf. It is true, the contract bears the signature of "W. S. Cartwright," without more. But, coupled with the previous averment, it is not inconsistent with the fact of his having acted solely as the agent of Phelps. All that is agreed is in substance agreed between the plaintiff and Prothero. As to the 210*l.* being paid by Cartwright's check upon his own bankers, that does not appear to me to make any difference. It may well be that Cartwright pays it as the plaintiff's agent; the money may have been money of the plaintiff's deposited with Cartwright's bankers. It seems to me that the objection, that the present plaintiff is not the pre-

per person to bring the action, fails, because, in this view, of course, the consideration of 210*l.* is moving from the plaintiff, and not from Cartwright.

As to the other point, it is said that there is no proper averment of a tender of an assignment. Looking at the agreement, however, it appears to me that it was clearly the intention of the parties to it, that there should be a then present discharge from all further *liabilities, and that, Phelps having paid the money, Prothero [*400 was not further to proceed against him for the rents and covenants in the lease; but, inasmuch as that could not formally be done without an assignment or some deed, the agreement goes on to provide that that shall be done upon his assigning his estate and interest in the lease. When that assignment takes place, then the thing is to be formally done. It does not appear to me to be at all necessary, looking at the terms of the agreement, that there should be any averment in the declaration that such assignment was made or offered to be made within any reasonable time, or at any time at all. It was enough to state that the plaintiff was always ready and willing to assign, and tendered and offered to assign prior to the commencement of the action.

The fifth and twelfth pleas depend upon the same considerations as the declaration, and, the latter being good, the former necessarily fail. And the fourteenth plea was abandoned.

As to the fifteenth plea, I am of opinion that it affords no equitable defence, upon the grounds that have already been sufficiently stated by my Lord and my learned Brothers.

Judgment for the plaintiff.(a)

(a) This case is now standing for argument before the Lords Justices, upon the question how far the jurisdiction of the Court of Chancery is affected by that given to the courts of law under the 83d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

***YOUNG v. GEORGE WINTER and JAMES WINTER.** [*401
June 4.

A. being indebted to B., assigned to him a policy of assurance on his life, and covenanted to pay the annual premiums, and, in case he did not, and A. should pay them, he would repay him the amount with interest, on demand. B. afterwards became bankrupt, and obtained his certificate. A premium accruing due after the bankruptcy, and being unpaid by B., and A. having paid it, and not being repaid:—Held, that B. was not discharged, by virtue of the 12 & 13 Vict. c. 106, ss. 178, 200, from liability for the breach of the first of these covenants, but that he was discharged quoad the breach of the second covenant.
Sed vide post, 418 (a).

THE first count of the declaration stated, that, on the 19th of January, 1858, by a certain indenture then made between the defendant James Winter of the first part, the defendant George Winter of the second part, and the plaintiff of the third part,—after reciting, amongst other things, that, by a certain indenture dated the 24th of June, 1852,

certain pieces of ground therein described were charged with and made subject and liable to, and covenanted to remain vested in the plaintiff, his executors, administrators, and assigns, subject to certain articles of agreement dated the 23d of June, 1852, and made between the defendants of the one part, and the London Assurance Loan Company of the other part, and all principal moneys and interest due thereon, and also subject to a proviso for redemption of the same premises on payment by the defendants respectively, or their respective heirs, executors, administrators, or assigns, to the plaintiffs, his executors, administrators, or assigns, on demand, certain sums of money therein mentioned, not exceeding in the whole the sum of 2000*l.*, with interest on the same respectively, after the rate, at the time, and in manner therein mentioned; and that, by a certain policy of assurance under the hands of two of the directors of the Law Property Assurance and Trust Society, and under the common seal of the same society, at No. 30, Essex Street, Strand, London, bearing date the 31st of December then last past, and numbered 638, the said directors, in consideration of the sum of 48*l.* 18*s.* 4*d.* to be paid to them yearly on or before the 31st of December in every year during the term of twenty years, commencing *402] on the said 31st of December *then last past, assured to the defendant James Winter, his executors, administrators, or assigns, the payment of the sum of 999*l.* 19*s.* sterling on the expiration of the said term, or, in the event of the death of the said defendant James Winter at any time during the said term, then on his decease, together with such a proportion of the profits of the said society as therein was mentioned; and that the plaintiff had some time since, at the request of the defendants, guarantied to the Hastings branch of the London and County Bank the payment of certain sums of money which might from time to time be overdrawn by the defendants on their account with the said bank, and which said sums so guarantied were then already secured to the plaintiff by the said thereinbefore-recited indenture; and that the defendants had requested the plaintiff to continue such guarantee; and in order to give the plaintiff a further security for such guarantee as aforesaid, the defendants had agreed to execute to him the further security thereafter contained,—the defendant James Winter, for the considerations therein mentioned, did thereby bargain, sell, and assign to the plaintiff, his executors, administrators, and assigns, the said thereinbefore in part recited policy of assurance, and all sums of money recoverable or to be received by virtue thereof, To have, hold, receive, and take the said policy, moneys, and premises, unto the plaintiff, his executors, administrators, and assigns, to and for his and their own absolute use and benefit, subject, nevertheless, to a certain proviso for the redemption thereof in the said indenture contained: And the defendants, for the considerations therein also mentioned, did thereby covenant with the plaintiff, that they the defendants, or one of them, should

and would from time to time, so long as any money should be due and owing by virtue of the said indenture of the 24th of June, 1852, pay unto the said Law Property Assurance and Trust Society the annual premiums *which should from time to time become payable for [*403 keeping on foot the said policy of assurance, and would pay the said premiums when and as they should become due; and also, that, in case any annual premium should be at any time suffered to remain unpaid, then it should be lawful for the plaintiff, his executors, administrators, or assigns, to make payment of the said premiums, so as to keep the said policy alive and in full force so long as any money should be due by virtue of the said indenture; and that, in case and as often as the defendants, or one of them, their or one of their executors, administrators, or assigns, should make default in payment of the said premiums, and the plaintiff, his executors, administrators, or assigns, should pay any sum of money in or towards paying the same, then that the defendants, or one of them, should, on demand, pay to the plaintiff such sums, with interest thereon after the rate of 5*l.* per centum per annum: Averment, that, after the said covenant of the defendants, and whilst money was and remained due and owing by virtue of the said indenture of the 24th of June, 1852, and the said indenture in and by which the defendants covenanted as aforesaid, an annual premium, amounting, to wit, to the sum of 48*l.* 18*s.* 4*d.*, became due for keeping on foot the said policy of assurance; And that, although the plaintiff had done all things necessary, and all things had occurred and happened necessary, and all conditions precedent had happened and been performed necessary, to entitle the plaintiff to have the said last-mentioned annual premium paid to the said Law Property Assurance and Trust Society when and as the same became due; yet the defendants did not, nor did either of them, pay the same as it became due, or at any other time, but omitted to do so: And that, after the defendants made such default in payment of the said last-mentioned premium, and whilst the same remained due and unpaid, the *plaintiff made [*404 payment of the said last-mentioned premium, in order to, and did thereby, keep the said policy alive and in full force,—whereof the defendants then had notice; and although the plaintiff had done all things necessary, and all things had occurred and happened necessary, and all conditions precedent had happened and been performed necessary, to entitle the plaintiff to be repaid the said premium so paid by him as last aforesaid, with interest thereon after the rate aforesaid; and although money still remained due and owing upon and by virtue of the said indentures respectively; yet the defendants had not, nor had either of them, repaid to the plaintiff the amount of the said last-mentioned premium so paid by him as aforesaid, or any part thereof, but had omitted so to do, and the same, and every part thereof, remained due and unpaid to the plaintiff.

The second count was upon an indenture of the 23d of February, 1853, between George Winter of the first part, James Winter of the second part, and the plaintiff of the third part, in similar terms to the indenture in the first count mentioned, the policy thereby assigned being on the life of George Winter, and bearing date the 11th of February, 1853, and numbered 667, and the annual premiums being 53*l.* 18*s.* 4*d.*; and the count contained the same averments and alleged the same breaches as in the first count.

The defendant George Winter pleaded,—first, as to the first breach in each count, that, before and the time of the defendants' becoming such bankrupts as thereafter mentioned, and thence continually until the filing of the petition for adjudication thereafter mentioned, they the defendants were builders, dealers and chapmen, and copartners, trading in copartnership together at Hastings, in the county of Sussex, according to and within the meaning of "The Bankrupt Law Consolidation Act, 1849," and, being such traders, had *become and
*405] were indebted to J. B. White the younger, G. F. White, and R. O. White, subjects of this realm, in the sum of 50*l.* and upwards, for a true and just debt due to them as partners in trade; that thereupon, and after the commencement and taking effect of the said act, and after the 11th of October, 1849, therein named, and whilst the defendants remained so indebted, they the defendants became and were bankrupts within the meaning of the said act; that afterwards, and whilst they remained so indebted, and after the making and executing of the said indentures of the 19th of January, 1853, and the 23d of February, 1853, in the first and second counts of the declaration respectively mentioned, and the plaintiff not having at the time of the making and executing of the said last-mentioned indentures, or either of them, nor having then had notice of an act of bankruptcy by the defendants or either of them committed, that is to say, on the 24th of October, 1853, the said J. B. White the younger, G. F. White, and R. O. White, duly made and presented their petition to and in the court of bankruptcy, Basinghall Street, London, for an adjudication of bankruptcy against the defendants,—the defendants having resided and carried on business for six calendar months next immediately preceding the time of the filing such petition within the district of the last-mentioned court, and such court having jurisdiction in the premises,—and which petition was in the form prescribed and required by the said act, and the truth thereof was duly verified by affidavit in the form prescribed and required by such act; and such petition was then filed in such court of bankruptcy; that thereupon such court did, in due form of law, find that the defendants had become and were bankrupts before the date and filing of the said petition, and did thereupon declare and adjudge them to be bankrupts accordingly; that such proceedings were thereupon

duly had in the matter *of the said petition, that the defendants afterwards, and before this suit, became and were entitled to [*403 have their respective certificates of conformity allowed under the said act; and that thereupon, and before this suit, at a public sitting of the said court for the allowance of such certificates, duly holden in that behalf, and of which notice had been duly given, the said court, having regard to the conformity of the said defendant George Winter to the law of bankruptcy, and to his conduct as a trader before as well as after his bankruptcy, duly found the said defendant George Winter entitled to such certificate of his conformity, and then duly allowed the same; and that such certificate was and is in writing, under the seal of the said court of bankruptcy, and the hand of J. Evans, Esq., the commissioner acting in the matter of the said petition, and dated the 9th of May, 1854, and was and is in the form contained in the schedule Z. to the said act annexed, and of the second class.

Secondly, as to the second breach in each count, that the defendants became such bankrupts, and he the said George Winter thereupon, and before this suit, became entitled to obtain and did obtain such certificate of conformity as in his said first plea thereinbefore mentioned, and that such first plea, and the several allegations therein respectively contained, were and are true in substance and in fact.

The defendant James Winter pleaded similar pleas to the several breaches in each count.

To each of these pleas the plaintiff demurred, the grounds of demurrer stated in the margin, as to each, being "that the bankruptcy and certificate of the defendant is no answer to the plaintiff's claims in respect of the breaches of covenant to which the plea is pleaded, such claims not being provable under such bankruptcy."

*The defendants joined in demurrer.

Honyman, in support of the demurrers.—The defendants' cer- [*407 tificate clearly affords no answer to this action. The indenture contains two covenants, upon each of which a breach is assigned,—one, a covenant by the defendants to pay the annual premiums due on the respective policies,—the other, to repay to the plaintiff any premiums which he might pay pursuant to the power for that purpose reserved to him, in case of their default. The effect of such a covenant was considered in the case of *Bennett v. Burton*, 12 Ad. & E. 657 (E. C. L. R. vol. 40), 4 P. & D. 818. There, by deed of mortgage for a debt of 1000*l.*, the mortgagor covenanted, as a further security, to insure his life for the mortgagee's benefit, deliver the policy to him, and keep the premiums paid till the debt was discharged; and that, if, in the mean time, the premiums should be in arrear, the mortgagee might pay them, and recover the amount from the mortgagor: the mortgagor afterwards took the benefit of the insolvent debtors act, 7 G. 4, c. 57, and included the 1000*l.* debt in his schedule, stating also that the creditor held a

policy of insurance on his life, with the joint security of A. B. for payment of the premiums: and it was held, that the mortgagor was not protected by his discharge, and sect. 51 of the statute, from an action of covenant at the suit of the mortgagee, for premiums becoming due after such discharge, and paid by the mortgagee on the mortgagor's default. That decision was recognised and confirmed by *Fletcher v. Turk*, 18 Law Journ. N. S. Q. B. 43. The point afterwards arose upon the 56th section of the bankrupt act, 6 G. 4, c. 16, which is substantially the same as the 177th section of the 12 & 13 Vict. c. 106, in *Toppin v. Field*, 4 Q. B. 886 (E. C. L. R. vol. 45), 3 Gale & D. 340. It was there argued, on the part of the defendant, that the debt to

*408] secure which the *policy of insurance had been assigned, being provable under the commission, and the remedy to recover it barred, the bankrupt was discharged from liability to keep up the security, and that the amount recoverable under the covenant constituted a contingent debt provable under the commission, under the 56th section of the 6 G. 4, c. 16. But Lord Denman, in delivering the judgment of the court, said: "It is unnecessary to refer particularly to the cases cited upon the argument; for, we are clearly of opinion, and our judgment is in accordance with all those cases, that the liability of the defendant to pay the premiums of insurance to the insurance office did not constitute any debt between the bankrupt and the plaintiff, either contingent or otherwise, and consequently was not provable under the commission. The covenant is quite collateral to the original debt which the policy was assigned to secure; and the claim is for unliquidated damages, which might be more or less according to circumstances." Under the 6 G. 4, c. 16, where the debt was payable on a contingency the value of which was not readily ascertainable, the certificate was held to be no discharge. Thus, in *Thompson v. Thompson*, 2 N. C. 168 (E. C. L. R. vol. 29), 2 Scott, 266 (E. C. L. R. vol. 30), it was held that the instalments of an annuity for the payment of which the bankrupt was surety only, and which he expressly covenanted to pay in case of the default of the grantor, were not provable under a fiat against the surety, where such instalments did not become due until after the bankruptcy of the surety. "If," said Tindal, C. J., "the instalments of an annuity are provable at all, it must either be by proving the present value of the whole annuity, or by proving the separate value of each instalment as it falls due. But it is obvious that the act has made no provision for the proof of the present value of the annuity against the estate of the surety. If the whole annuity is allowed to be proved against the estate of the surety, there

*409] *is no provision in the statute for reimbursing the estate of the surety, by enabling the assignees to look to the principal debtor for indemnity: whereas, in the case of the bankruptcy of the grantor of the annuity, and the annuity being valued and proved against his estate, a provision is made for the indemnity of the surety, by the 55th

section, viz. that the surety, by paying to the creditor the ascertained value of the annuity, may have the benefit of the proof of the annuity-creditor against the bankrupt's estate. By this course, the whole of the annuity transaction is closed as to all the parties, the grantor, the surety, and the annuitant. The absence, therefore, of any similar provision in the case of the surety becoming bankrupt, leads to the inference that it was not intended to provide for such case by the statute, but that it should be left as it stood at common law. And we think, that, as the whole value of the annuity is not provable at once under the 56th section, so neither is each particular instalment provable after the contingency happens: for, the 54th section of the act deals with an annuity as a debt of a peculiar nature, and provable in one way only; directing the present value of the whole annuity to be ascertained, and such whole value to be the subject of proof: not that each successive instalment shall be proved as it becomes due. And, if the annuity is so dealt with under the 54th section, where the proof takes place against the grantor's estate, there is no reason to suppose the legislature would have treated it differently under the 56th section, as against the estate of the surety, if such annuity was intended to be proved under that section." In *Ex parte Davies*, 1 Deacon's B. C. 115 (E. C. L. R. vol. 38), the bankrupt, previously to his marriage, entered into a bond, that, in case his wife should survive him, and should within two months after his death, at the costs and charges of his heirs or devisees, release her dower, his heirs or executors should, *within three months after his death, pay to her 2000*l*. The wife survived the [410 bankrupt, but did not within two months after his death release her dower, although she was always ready and willing to do so: and it was held, that the bond was not provable, either under the first or the last part of the 56th section of the 6 G. 4, c. 16, inasmuch as the contingency had not happened, and no value could be set upon it. In *Ex parte Tindal*, 8 Bingh. 402 (E. C. L. R. vol. 21), 1 M. & Scott, 607 (E. C. L. R. vol. 28), Mont. & M'A. 415, the contingency was held to be susceptible of valuation, and therefore provable. But, in *Ex parte Foster*, 9 C. B. 422 (E. C. L. R. vol. 67), the claim was held not to be provable, on the ground that it was not susceptible of valuation. There are cases where a distinction has been drawn between a contingent *liability* and a contingent *debt*, and where it has been held that the former was not provable. Thus, in *Hinton v. Acraman*, 2 C. B. 367, 409 (E. C. L. R. vol. 52), Tindal, C. J., speaking of the 56th section of the 6 G. 4, c. 16, says: "In the construction of this section, a distinction has been taken (in the case of *Ex parte Marshall*, 1 Mont. & Ayr. 145, cited and relied upon by Erskine, J., in *Abbott v. Hicks*, 5 N. C. 578 (E. C. L. R. vol. 35), 7 Scott, 783) between contingent liabilities which may never become debts, and debts payable on a contingency; and it has been held that the latter only are provable under the commission. The present

case, although in form a case of debt on bond, yet, the bond being defeasible on performance of the condition, it is, in substance, not the case of a contingent debt, but a contingent liability. At the time when the fiat issued, it was quite uncertain whether any debt would ever arise upon the bond: it was at that time a liability which would not become a debt, unless the condition were broken." That was followed by *Hawkins v. Bennett*, 8 Exch. 107.† There, the defendant, as surety, entered into a bond in a penal sum, with a condition, *411] "that, if he should pay to the plaintiff such costs as he should in due course of law be liable to pay in case the verdict should pass for the then defendant in an action pending, which had been brought by one C. in the name of the plaintiff, such costs to be first taxed by one of the masters in the usual manner, the bond was to be void. The action mentioned in the condition was a *seire facias* on a judgment obtained by the plaintiff, and which had been assigned to C. by T. H., since deceased, of whom the plaintiff was executor. The action was tried at the Spring Assizes in 1848, when a verdict was found for the defendant. In the following Easter Term, a rule nisi for a new trial was obtained. On the 14th of November following a fiat in bankruptcy issued against the defendant. In Hilary Term, 1849, the rule for the new trial was discharged. On the 29th of May, the defendant obtained his certificate, and on the 22d of August the costs were taxed. It was held, that, at the time the fiat issued, the defendant's liability under the bond was a mere contingent liability, and not a contingent debt within the 6 G. 4, c. 16, s. 56, and therefore that the plaintiff's claim for the costs was not barred by the defendant's certificate. Martin, B., in giving the judgment of the court, there says: "We think that this liability was not a *debt* at all within the meaning of the section. It was a contract to indemnify a nominal plaintiff, whose name was used by a third person, against such costs as the plaintiff might become liable to pay the defendant in the suit, should the latter obtain judgment in his favour. It seems to us impossible to consider this a *debt*. It is a contingent liability, but not a contingent debt. The case of *Birè v. Moreau*, 4 Bingh. 57, 12 J. B. Moore, 226 (E. C. L. R. vol. 22), decides that the costs themselves would not be a contingent debt; à fortiori, therefore, we think a contract to indemnify against them can- *412] not be one. In *Ex parte Tindal*, the *nature of debts payable on a contingency, which were provable under a fiat, was fully considered by Lord Chancellor Brougham, assisted by the late Lord Chief Justice Tindal and Mr. Justice Littledale: but there is nothing to be found there to support the view that such a liability as the present was provable under the 56th section of the late bankrupt act." Such being the state of the law, the statute 6 G. 4, c. 16, is repealed, some of its clauses being re-enacted, by the 12 & 18 Vict. c. 106. The 177th section, which is in substance a re-enactment of the 56th section

of the former act, enacts, "that, if any bankrupt shall, before the issuing of the fiat, or the filing of a petition for adjudication of bankruptcy, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such fiat or the filing of such petition, the person with whom such debt has been contracted may, if he think fit, apply to the court to set a value upon such debt, and the court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed." After the cases which have been cited, it will not be contended that this case, which is one of mere contingent liability, falls within that section. But reliance will be placed on the 178th section, which enacts, "that, if any trader who shall become bankrupt after the commencement of this act, shall have contracted, before the filing of a petition for an adjudication of bankruptcy, a liability to pay money *upon a contingency which shall not have happened, and the de- [413
mand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to *claim* for such sum as the court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends, provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed; provided also, that, where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees at any time after the expiration of such time, and if the court shall think fit, be expunged either in whole or in part from the proceedings." This section, it is submitted, whilst it has removed one objection under the old act as to contingent liabilities, has left the other untouched. It applies only to cases where the covenant is for payment of money to the plaintiff, not where it is to pay to a third person. [MAULE, J.—Suppose the bankrupt had been surety for the good conduct of a clerk, the court would have to determine what sum was likely to become due under that covenant, and would admit a claim for that sum. If the liability arises

within six months, the claim becomes a proof; if not, it may be expunged. JERVIS, C. J.—There is no doubt the framers of the act contemplated and intended to cure all the difficulties that had *arisen *414] under the former act. Whether they have done it or not is another matter.] However that may be, this is not a claim in respect of which the bankrupts are discharged by the 200th section, which enacts “that the certificate of conformity allowed under this act, subject to the provisions herein contained, shall discharge the bankrupt from all *debts* due by him when he became bankrupt, and from all *claims and demands made provable under the bankruptcy*.” “Made provable” means, any debt or demand which the creditor can *absolutely prove*. [JERVIS, C. J.—Is not a contingent liability made provable under this act?] Only when the contingency has happened. [MAULE, J.—The thing made provable, is, a claim arising on a contingency which shall happen within six months. If the contingency happens after the six months, the assignees may expunge it.] All the party gets under s. 178, is, a contingent right to prove. “Claim” is a known term in the court of bankruptcy. [JERVIS, C. J.—The object was to set the bankrupt free from *all* liabilities, contingent or otherwise.] The only case which seems as yet to have been decided upon this section, is, *Temple v. Pullen*, 8 Exch. 389.† In July, 1846, the defendant, having been arrested under a ca. sa., in order to obtain his discharge, gave to the attorney of the execution-creditor 5*l.* and a blank promissory note stamp with his name written on it. In May, 1851, the defendant obtained a certificate in bankruptcy (under the 12 & 13 Vict. c. 106), and in October, 1852, the attorney filled up the blank stamped paper, by making it a promissory note for 24*l.* 18*s.* 6*d.*, at one month’s date, and endorsed it to the plaintiff for value: and it was held, that there was no claim provable under the fiat, and consequently the certificate was no bar to an action on the note.

Then, this plea neither adopts the statutory form, nor does it allege *415] facts to bring the defendant within the *terms of the act of parliament. The 205th section of the 12 & 13 Vict. c. 106, provides that any bankrupt who shall, after his certificate shall have been allowed, have any action brought against him for any debt, claim, or demand provable under his bankruptcy, may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence. The plea in the present case does not follow that form, nor does it aver that the demand in respect of which this action is brought, was provable under the fiat; and, if any case can be suggested in which the claim would not be provable, the plea would be clearly bad. [MAULE, J.—I doubt whether the statutory form of plea would be applicable here.] The power of pleading in that general form is given in precisely the same cases as those in which the discharge is given. [MAULE, J.—Does not the plea allege

matters which show that the plaintiff's claim was necessarily provable under the fiat?] No. It is consistent with the plea, that the contingency did not happen within the six months. The plea does not show that there was any period of time when the plaintiff could have proved this debt.

Lush, contra.(a)—This clearly is a case which was *intended to be provided for, and is provided for, by the 178th section of [*416 the act; and it would be very extraordinary if it were not so, seeing that the case of *Bennett v. Burton*, 12 Ad. & E. 657 (E. C. L. R. vol. 40), 4 P. & D. 313, which is exactly parallel with this, was decided very shortly before the passing of the act. The 178th section does not mean to limit the right of proof to contingencies arising within the six months. The proviso merely has this effect,—that a claim upon the proceedings entitles the party to have money reserved to meet the dividend thereon: but, if the contingency has not happened in the mean time, the assignees may at the end of six months apply to the commissioner to release the fund, leaving the claimant to take his chance, if his demand becomes afterwards provable, out of such funds as may remain. That is the whole effect of the proviso. By s. 172, provision is made for the proof of debts not payable at the time of the bankruptcy; by s. 173, for proof by sureties; by s. 174, for proof by obligees in bottomry or respondentia bonds, and the assured in policies of insurance; by s. 175, for proof by annuity creditors; and by s. 176, for proof by sureties for the payment of annuities. [JERVIS, C. J.—The series of clauses from s. 171 to s. 177 nearly exhausts every possible claim; and then s. 178 evidently meant to provide for everything not before specifically provided for.] The language of the 178th section differs materially from that of the 177th. Nothing is said about setting a value upon the claim: when the party comes to prove, the demand has been ascertained. [MAULE, J.—Suppose a man becomes surety for a tenant, that he shall duly pay his rent and observe all the covenants contained in his lease, and then becomes bankrupt,—would not the claim of the landlord be a claim within the 178th section?] No doubt it would. [MAULE, J.—Suppose the tenant has *been guilty of numerous breaches of [*417 covenant, how is the amount of damages to be ascertained?] By the commissioner. The moment a creditor appears and submits himself to the jurisdiction of the court, the powers of the commissioner under s. 12 become very extensive. The object of the 178th section evidently was, effectually to relieve the bankrupt, and to give the creditor the

(a) The points marked for argument on the part of the defendants respectively were,—“1. That his bankruptcy and certificate under The Bankrupt Law Consolidation Act, 1849, are a defence in respect of the breaches of covenant pleaded to by his first plea; see s. 178. 2. That such bankruptcy and certificate are a defence in respect of the breaches of covenant pleaded to by his second plea. 3. That the claims to which the first plea applies were provable under the bankruptcy. 4. That, even, if those claims were not so provable, yet at all events the claim to which the second plea applies, was provable under the bankruptcy.”

benefit of an extended right of proof. There is not a word in the clause which might not fairly embrace this case. Then, what is the covenant here? The defendants covenant to pay the premiums on the policies when and as they should become due, and that, in case the premiums should be at any time suffered to remain unpaid, it should be lawful for the plaintiff to pay them, so as to keep the policies alive, and the defendants should repay the same on demand, with interest. Taking the whole together, the defendants have contracted a liability upon a contingency which has not happened. [MAULE, J.—I think there are two covenants,—one, that the covenantors shall pay absolutely,—the other, that the covenantee, in case of default by the covenantors, may pay the premiums, and in that case the covenantors will repay him the amount, with interest.] Assuming that there are two covenants, whatever damages the plaintiff could recover on the first, would, the moment they are ascertained, be a demand provable against the estate. For what he has paid under the second covenant, the plaintiff must prove. [MAULE, J.—Suppose the second covenant had not been there at all, the non-payment of the premiums by the bankrupts would have been a breach of the first covenant. What damages would the plaintiff have been entitled to in that case?] Nominal damages would be all he could recover on the first breach. [MAULE, J.—The result will be, that the plaintiff is entitled to judgment on the demurrers to the pleas to the *418] first breach, and the defendants to *judgment on the demurrers to the pleas to the second breach.]

Per Curiam.

Judgment accordingly.(a)

(a) The Court of Queen's Bench, in a case of Warburg v. Tucker, decided in this term, took the same view as to both covenants which this court took as to the first covenant.

There the declaration contained two counts,—one upon the covenant by the defendant to pay the annual premiums,—the other, upon the covenant to repay such sums as the covenantee might pay to keep alive the policies: and there was a general plea of bankruptcy after the assignment and after breach. The judgment of the court was delivered by Lord Campbell, who is reported to have said in substance as follows:—

"This case turns on the 178th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. It was properly admitted by the defendant's counsel, that, under no other statute could such a claim as that which is made in this action have been provable under a bankruptcy. We think that, notwithstanding that section of the recent statute, the liability of the defendant in respect of these breaches still remains undisturbed. By the deed of assignment of the policies mentioned in the declaration, the defendant covenanted punctually to pay the premium, and he further covenanted that it might be lawful, in case of any default on his part, for the plaintiff to keep up the premiums, and that the defendant would repay him on demand the amount so paid. The declaration contained two counts, the first charging that the defendant did not pay the premiums; and the second, that, although the plaintiff had advanced the amount, the defendant had not repaid him on demand. The plea was to the whole declaration, and was, that the defendant became a bankrupt subsequent to the deed of assignment, and before the breaches complained of. Now, it seems clear to us that this plea is no bar to the first count. The covenant on which that count is framed is not a covenant to pay on a contingency, but a covenant to pay absolutely; and, therefore, the 178th section is not applicable. Although we have more doubt as to the second count, still we think that on this also the plaintiff is entitled to judgment. The statute certainly speaks of a liability contracted by a bankrupt to pay money on a contingency, as being provable, without saying that the liability must exist directly between the parties. But, however this may be, we do not think that *provision has been made by the statute for such a case as this, where successive payments have to be made at successive times during the lives of two individuals, and where the liability

arises, in the event of the non-payment of any one of the premiums by the defendant, of the plaintiff's paying the premium, and of his then making a demand on the defendant for repayment of it. It is said that proof might be made in respect of a single case of such default on the part of the defendant; and that, if that is so, proof may equally be made in respect of the whole series of payments, as the value of these is a mere matter of calculation. The statute, however, seems to contemplate only one contingency on which the payment depends. It makes provision for one payment only, depending on one contingency; and the words 'so far as practicable' show clearly that the section was not intended to include all contingencies, but only those in respect of which calculation could be conveniently made. Our attention was properly drawn to the words 'When any claim shall not have either in whole or in part been converted,' as tending to show that the statute had in view periodic payments depending on periodic contingencies, as it contemplated the possibility of the whole of a claim not being proved at once. But the words seem to us to refer only to successive proofs of debts or liabilities depending on one contingency. Indeed, the construction contended for would be wholly inconsistent with the general scope of the statute, by which the whole property of the bankrupt is to be equally distributed among his creditors. The principle upon which we decide this case was acted upon by the Court of Common Pleas in *Thompson v. Thompson*, 2 N. C. 168, 2 Scott, 266; and that case was followed by this court in *Amott v. Holden*, 22 Law Journ. Q. B. 14. In conclusion, we think that further interference on the part of the legislature is necessary to make such claims as these provable in a court of bankruptcy. There must, therefore, be judgment for the plaintiff."

The above is taken from *The Weekly Reporter* of the 23d of June, 1855, p. 565. And see 25 *Law Times*, 246.

See also *Ex parte Todd*, re *Williamson*, 25 *Law Times*, 285. A verdict having been obtained against the bankrupt before his bankruptcy, in an action for a tort, subject to a reference as to the amount of the damages to be recovered, the award was made after the bankruptcy, and judgment signed for the sum awarded, and costs: and it was held by Lords Justices Knight Bruce and Turner, that the plaintiff in the action was not entitled to prove the amount of his judgment as a debt in the bankruptcy. And Lord Justice Knight Bruce said "he was not sure that he should not have come to the same conclusion if the action had been upon contract."

A ground-rent payable under a perpetual covenant coming due after the discharge of the debtor as a bankrupt is not extinguished by his certificate: *Dole v. Bosler v. Kuhn*, 8 Watts & Serg. 183. A rent service is not a debt; and a covenant to pay it is not a covenant to pay a debt: it is a security for the performance of a collateral act. The annual payments spring into existence, and for the first time become debts, when they are demandable: *Ibid.*; *Stinemetz v. Ainslee*, 4 Denio, 573; *Prentiss v. Kingsley*, 10 Barr, 120. A discharge of one surety in bankruptcy does not discharge him from the claim for contribution of another surety, who pays money for the principal after the decree in bankruptcy: *Dole v. Bosler v. Kuhn*, 8 Watts & Serg. 183. *Warren*, 82 Maine, 94; *Gass v. Gibson*, 8 Humphreys, 197; *Dunn v. Sparks*, 1 Carter, 397. A covenant for quiet enjoyment in a deed is discharged by a certificate obtained by the covenantor, when the breach happened after the petition in bankruptcy was filed on which the proceedings were founded: *Ilmison v. Blawie*, 5 Barbours Sup. Ct. 686.

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*STRATTON v. PETTIT. June 7.

In construing a written contract, the court will, if possible, so read it as to effectuate the intention of the parties, rather than defeat it.

By "articles of agreement" between A. and B., it was witnessed that A. agreed to let, and B. agreed to take, certain premises then in the possession of B., for the term of five years; and A. agreed to sell, and B. agreed to purchase, the fee-simple of the premises, to be conveyed to B., his heirs, &c., absolutely, at the end of the said five years, provided B., his heirs, &c., should have in the mean time quietly occupied and not have been evicted from the premises; yielding and rendering by B. unto A., as well for the rent or use of the said premises for five years, as for the said purchase thereof, 70*l.* in and by 70 shares of 1*l.* each, in the Birkbeck Life Assurance Company, the receipt and delivery unto A. of the said shares of the value of 70*l.*, in full for the said rent and purchase, A. thereby admitted: And it was further agreed, that, should B. be legally ejected from the premises within or during the term of five years, A. should pay or refund to B., either in cash or in the said shares, at and after the rate of 7*l.* 10*s.* per annum for the portion of the term unexpired at the time of such eviction, and that A. should also indemnify B. against all loss and expense in maintaining possession. And it was further agreed that no abstract or investigation of title should be permitted or required beyond evidence of the seisin and possession as owner by A. and his ancestors for twenty-one years and upwards last past; and that B. should immediately do and execute all acts necessary to transfer and vest the said 70 shares in A.

Held, that the intention of the parties, to be collected from the language of the instrument, was, that it should take effect as a lease, and consequently that it was void, as such, by the 3d section of the 8 & 9 Vict. c. 106, not being by deed.

Held also, that the production by A. of evidence of the seisin of himself and his ancestors for twenty-one years and upwards, was not a condition precedent to his right to call upon B. to execute a transfer of the shares.

THE declaration was upon the following articles of agreement:—

"Articles of agreement, made the 3d of April, 1854, between John George Stratton (the plaintiff), of Cottage Row, Bermondsey Wall, in the county of Surrey, of the one part, and George Pettit (the defendant), also of Cottage Row, manufacturer, of the other part, witnesseth that the said John George Stratton agrees to let, and the said George Pettit agrees to take, all that house No. 42, Cottage Row aforesaid, and the premises, with the advantages and appurtenances thereunto belonging or appertaining, now in the possession of the said George Pettit, to hold unto the said George Pettit, his executors, administrators, and assigns, from the 25th of March last, for the term of five years; and the said John George Stratton agrees to sell, and the said George Pettit agrees to purchase, the fee-simple of and in the said premises, to
*421] be conveyed unto the said *George Pettit, his heirs, executors, administrators, and assigns, absolutely, at his expense, at the end of the said five years, provided the said George Pettit, his heirs, executors, administrators, or assigns, shall have in the mean time quietly occupied, and not have been evicted from the said premises; yielding and rendering by the said George Pettit unto the said John George Stratton, as well for the rent or use of the said premises for five years, as for the said purchase thereof, 70*l.*, in and by seventy shares of 1*l.* each in The Birkbeck Life Assurance Company, the receipt and delivery unto the said John George Stratton of the said shares of the value of 70*l.*, in full for the said rent and purchase, the said John George Strat-

ton hereby admits: It is further agreed between the said parties, as follows,—that, should the said George Pettit be legally ejected from the said premises within or during the said term of five years, then there shall be paid or refunded by the said John George Stratton to the said George Pettit, either in cash or in the said shares, at and after the rate of 7l. 10s. per annum for the portion or part of the said term of five years unexpired at the time of such eviction, taking the said shares at the price or value aforesaid, and the said John George Stratton shall also pay or indemnify the said George Pettit from and against all loss, costs, and expenses, on both sides, in maintaining and retaining the possession of the said premises, and of all proceedings for that purpose;—that the said John George Stratton shall pay all arrears of and all future rates, taxes, and outgoings of every description, of, for, or upon the said premises, for and during the said term of five years, and the said John George Stratton shall pay all expenses incurred by him or by the said George Pettit for repairs to the outside of the said house, for the said term;—that, if the said John George Stratton shall within five years cease to occupy the said house, 48, Cottage Row, *aforesaid, the said George Pettit shall thereupon have the option [422 and liberty to take, receive, and have the said house No. 48, Cottage Row aforesaid, in lieu and instead of the above-mentioned premises No. 42, Cottage Row aforesaid, upon and for all the term, estate, and interest aforesaid, and thereupon this agreement shall apply to No. 48, Cottage Row aforesaid, and be carried out and executed accordingly; and the said John George Stratton shall not, for or during the said term of five years, part with or sell the said house, No. 48, to any other person than the said George Pettit;—that no abstract or investigation of title shall be permitted or required beyond evidence of the seisin or possession as owner by the said John George Stratton and his ancestors for twenty-one years and upwards now last past; and that the said George Pettit shall immediately do and execute all acts necessary to transfer and vest the said seventy shares in the said John George Stratton. In witness whereof, &c."

The declaration then proceeded to aver, that, although the defendant did deliver to the plaintiff the said seventy shares in the said company in full for the said rent and purchase as mentioned in the said agreement, and the plaintiff had hitherto performed all things in the said agreement contained to be performed on his part, and the defendant had hitherto quietly occupied the said premises without eviction or disturbance, and the plaintiff, after the said agreement, and before this suit, requested the defendant to transfer the said seventy shares to the plaintiff, and tendered to the defendant a proper transfer in writing for that purpose,—the execution of a transfer in writing then and still being necessary to transfer and vest the said seventy shares in the plaintiff according to the said agreement,—and a reasonable time for

the defendant to make and execute such transfer elapsed; yet the *423] defendant had not made or *executed any such transfer, or done any other act to transfer and vest the said shares in the plaintiff, but had wholly refused so to do, contrary to the said agreement; and thereby the said shares had become and were of no use or value to the plaintiff, and he had been and was unable to sell or dispose of the same: And the plaintiff claimed 100*l*.

Second plea,—that the said agreement in writing in the declaration mentioned, was made and entered into after the making and passing of the 8 & 9 Vict. c. 106, “An act to amend the law of real property,” and after the 1st of October, 1845; and that the said agreement in writing purported to be, and was and is, a lease of tenements and hereditaments which at the time of the making and passing of the said act was required by law to be in writing, being a lease of tenements and hereditaments for more than three years, to wit, a lease for five years; and that the said agreement in writing was not under seal, nor was the said lease made by deed; by reason whereof the said agreement in writing and the said lease were void at law.

Third plea,—that the plaintiff had not performed all things in the said agreement contained to be performed on his part, but, on the contrary thereof, the plaintiff, although requested so to do, did not nor would show and produce evidence of the seisin and possession as owner by the plaintiff and his ancestors for twenty-one years and upwards last past, at the time of the making of the said agreement, of the said house No. 42, Cottage Row, Bermondsey Wall, and premises thereunto belonging and appertaining; wherefore the defendant refused to execute a transfer of the said shares, as he lawfully might for the cause aforesaid.

Replication to the second plea,—that the said agreement in writing *424] was signed by the plaintiff and the *defendant, and was and is in the words and figures following,—setting it out verbatim.

Demurrer to the third plea, the ground of demurrer stated in the margin being, “that the plaintiff was and is entitled to a transfer of the shares mentioned in the agreement, without first producing any evidence of seisin or possession.” Joinder.

The defendant demurred to the replication to the second plea, the ground of demurrer stated in the margin being, “that the replication does not traverse nor confess and avoid the plea to which it is pleaded; and that it appears upon the face of the agreement, as set out in the replication, that it was a lease which ought to have been under seal, and that, not being under seal, it is void under the statute in the said second plea mentioned.” Joinder.

J. Brown, for the plaintiff.—The first question is, whether the 3d section of the 8 & 9 Vict. c. 106, renders the agreement declared on ineffectual, because it is not under seal. That section enacts “that a

feoffment made after the 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a partition, and an exchange of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said 1st of October, 1845, shall also be void at law, unless made by deed." The second plea assumes that the instrument *in question professes to be a lease for five years. That, however, is not so: it is not a lease, but an agreement only. It [*425 commences with the words "articles of agreement." It is, in truth, a combination of an agreement to demise and an agreement to purchase the premises. It would be in vain to argue that, before the statute 8 & 9 Vict. c. 106, if it stood alone as an agreement to let, the court would not have held it to be a lease: but the only reason why the court would so construe words of present demise, was, to carry into effect the intention of the parties. [JERVIS, C. J.—Then you admit that this instrument would have been held to be a lease before the passing of that statute; but you say that it is not so since the statute.] Distinctly. In Sheppard's Touchstone, Vol. 2, p. 82 (Preston's edition), the rule is laid down thus,—“A deed that is intended and made to one purpose may enure to another; for, if it will not take effect in that way it was intended, it may take effect another way; [provided it may have that effect consistently with the intention of the parties.] And therefore a deed made and intended for a release, may amount to a grant of a reversion, an attornment, or a surrender, or *è converso*. [But a grant of the reversion by the name of a reversion, will not pass land in possession.] And, if a man have two ways to pass lands by the common law, and he intendeth to pass them in one way, and they will not pass in that way; in this case, *ut res valeat*, it may pass the other way." In *Goodtitle d. Edwards v. Bailey*, Cowp. 597, 600, Lord Mansfield says: “The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense,—that they shall operate according to the intention of the parties, if by law they may; and, if they cannot operate in one form, they shall operate in that which by law will effectuate the intention.” In 2 Wms. Saund. 96 *b*, the learned editor, commenting upon a note *of the reporter in the text,— [*426 “The word ‘grant’ is of general extent, and may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender. Litt. § 581; Co. Litt. 301 *b*, 302 *a*,”—says: “And it is in the election of the party to use it to whichever of these purposes he pleases. Co. Litt. 301 *b*. The chief intent of the parties is, *to pass* the estate, and *the*

method of doing it ought to be subservient to that end: and, though the intent of the grantor is to be regarded *as to what estate(a)* is to pass, *and to whom*, yet it is not to be regarded *as to the manner* of passing it, for, of that he is supposed to be ignorant. And it is an established rule, that a deed shall never be laid aside as void, if by any construction it can be made good: Earl of Clanricard's Case, Hob. 277, Shepp. Touchst. 82, 83." In the case cited, Lord Hobart says: "I do exceedingly commend the judges that are curious and almost subtil, astuti (which is the word used in the Proverbs of Solomon in a good sense, when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act." Sanders v. Savile, cited in 3 Lev. 372, is also referred to, where a man seised in fee of a rent granted it by deed to one who was his kinsman, and there was an attornment to the grant, but it was made by a person who was not the real tenant of the land, and therefore void; though the intent appeared that the deed should *operate as a grant at common law with an attornment*, yet since it could not pass that way, it was adjudged that the grant being made to a relation *should operate as a covenant to stand seised*. Many other cases are referred to, and amongst them that of Roe v. Tranmar, Willes, 682, *427] *2 Wils. 75, where T. K., being seised in fee of certain premises, by lease and release, in consideration of natural love to his brother C. K., and of 100*l.*, *granted*, released, and confirmed to the said C. K. the said premises *after the death* of him the said T. K., to hold to the said C. K. and the heirs of his body, and, after their decease, to J. W., eldest son of his the grantor's well-beloved uncle J. W., and his heirs and assigns, to the only proper use of the said J. W. the younger, his executors, administrators, or assigns, for ever, the said J. W. the younger paying to the child or children of his the grantor's brother S. K. 200*l.*, and for want of such children, to other nephews and nieces therein mentioned, and for want of such children the estate was to be free from the payment of the sum of 200*l.*; the release contained covenants from the grantor, that he was seised in fee, and that it should be lawful for C. K. or J. W. the younger, after his the grantor's death, peaceably and quietly to hold, &c.; and it was thereby covenanted, *granted*, and agreed by and between the said parties, that all fines, recoveries, and other assurances of the said premises already levied, suffered, and executed by and between the said parties should enure to and for the only use and behoof of C. K. and the heirs of his body, and, for want of such issue, to the use of J. W. the younger, his heirs and assigns for ever. At the time of executing the deeds, C. K. paid 20*l.*, part of the consideration, in money, and gave his note for the remainder; and a receipt was signed by T. K. for the whole sum: T. K. continued seised until his death: C.

(a) See Doungsworth v. Blair, 1 Keen, 795; Mosely v. Motteux, 10 M. & W. 533, 542.†

K. died without issue: It was unanimously resolved, that, though the deed would not operate as a release, because it granted a freehold in future, which cannot by law be done, yet the deed of release operated *as a covenant to stand seised* to the use of J. W.; (a) that all the *particular rules that have been laid down with respect to cove- [428
nants to stand seised, concurred in that case; for, there was,—
1. a deed,—2. words sufficient to make a covenant; there being not only the word *grant*, which has been often construed as a word of covenant, but the grantor likewise expressly covenanted in two places in the deed that the estate should go to J. W. in such manner as he had granted it, —3. the grantor was actually seised at the time of the grant,—4. the intent of the grantor was plain that J. W. should have the estate after the death of C. K. without issue, for it is so said in express words in three places in the deed;—and, lastly, there was a proper consideration to raise the use, for J. W. is called in the deed eldest son of *his well-beloved uncle* J. W.: and, indeed, if it were not so *said* in the deed, his relation to the grantor might be averred and proved, according to the case of *Goodtitle v. Pitto*, 2 Stra. 934, 935, and several cases there cited out of Lord Coke's Reports. The only reason why words of mere agreement were held to amount to a lease in law before the late statute, was, that effect might be given to the intention of the parties. But, if the law had been as it is now, the court would in those cases have given the words their natural meaning. That that is so, is clear from two or three cases where it has been held that the same words may operate as either a lease or an agreement according to the possibility of passing the estate by those words or not. Thus, in *Mayfield v. Robinson*, 7 Q. B. 486 (E. C. L. R. vol. 53), by agreement, dated April 14th, 1804, not under seal, between M. and N., it was agreed that N. should rent of M. the ferry called D. for 6l. 6s. per annum, to be paid half-yearly, for which N. was to have the sole use of the ferry and whatever profit might accrue from it for the time he held the same; and the agreement proceeded, "Be it also known that N. has this day brought of M. the great ferry-boat, for the sum *of 20l., of which 5l. shall be paid," &c.,—instalments of 5l. to [429
be paid yearly on April 6th, the first in 1805: and it was held, that the instrument, purporting to convey an incorporeal hereditament, was not a lease, because not under seal. [JERVIS, C. J.—There, the instrument could not be a lease.] In Bacon's Abridgment, title *Leases and Terms for Years* (K), it is said: "Where one by articles covenants, grants, and agrees with J. S. that he shall have such lands, or have, hold, and enjoy such lands for so many years, these are words sufficient to show a present contract for the lessee's enjoying of those lands, and therefore amount to a present lease of them as effectually as if there had been the words *dimisit*, *locavit*, or such like: and, though there were in the same articles a covenant to make a good and perfect lease

(a) See *Doe d. Dyke v. Whittingham*, 4 Taunt. 20.

as counsel should devise, yet that would not prevent or destroy the operation of the first words as a present lease ; such covenant only being in majorem cautelam, that the lessee might require further assurance, by fine, or the like, if he found it necessary. And the difference is, where such articles by way of covenant are made by him who is owner of the land ; and where they are made by a stranger, or one who has then nothing in the lands : in the first case, they amount to a present and absolute lease ; but not in the other, because a man cannot be supposed to lease what he has not : or, if it might be so supposed, yet, when it appears in the very articles that he has nothing in the lands, his covenant then can have no other construction, but that he will procure the owner of the lands to permit the covenantee to hold and enjoy those lands ; which is the proper and natural interpretation of the words of the covenant, when he himself has nothing whereof to make a lease." So, when the parties here, knowing, or being bound to know, that they cannot make a demise except under seal, agree as they *480] have done, the court *should assume that they intended to make an agreement which they could make, rather than one which by law they could not make. This point has recently been under the consideration of the Court of Queen's Bench, in *Tress v. Savage*, 4 Ellis & B. 36 (E. C. L. R. vol. 82), where the court gave effect to the instrument as an agreement, though void as a lease. There, T. and S., after the statute 8 & 9 Vict. c. 106 came into operation, executed a written instrument not under seal, by which T. agreed to let and S. to hire land for a term exceeding three years, at a rent payable monthly. S. entered ; and it was afterwards orally agreed that the rent should be paid quarterly. It was held, that the statute 8 & 9 Vict. c. 106, s. 3, though rendering the lease void, as not being by deed, still made it void only as a lease, and did not prevent it from indicating the terms on which S. held as tenant from year to year ; and that, consequently, S.'s tenancy might be determined, during the term, by a half-year's notice, but at the end of the term, expired without notice. [WILLIAMS, J., referred to *Burton v. Reeve*, 16 M. & W. 307.†] That case turned upon the 7 & 8 Vict. c. 76, which was only in force nine months, and the words of which were altogether different from those of the present act. [JERVIS, C. J.—The simple question on the second plea, is, whether this instrument is void.] As a lease, no doubt it is : but the plaintiff merely seeks to use it as an agreement. It is an agreement of a very peculiar nature.

The third plea raises the point which was settled in *Pordage v. Cole*, 1 Wms. Saund. 319 l., where it was held, that, if it be *agreed* between A. and B., that B. shall pay A. a sum of money *for* his lands, &c., *on a particular day*, these words amount to a covenant by A. to convey the lands ; for, *agreed* is the word of both : but it is an independent covenant, and A. may bring an action for the money *before* any conveyance

by him of the land. *It is plain that neither party intended that the execution of the transfer should be postponed until the defendant had got evidence of the seisin. [JERVIS, C. J.—The instrument contains an acknowledgment on the plaintiff's part that he has received full satisfaction for the rent and purchase. The payment is valueless to the plaintiff unless the defendant executes the transfer. It is like an acknowledgment of the receipt of the purchase-money by bills, which the purchaser is to endorse. The amount does not become money had and received until the money is paid.] That disposes of the third plea. The case is very like that of *Gibson v. Goldsmid*, 1 Jurist, N. S. 1. There, by indenture of dissolution of a partnership, the defendant, in consideration of the covenant therein contained on the part of the plaintiff, assigned to the plaintiff certain shares in a foreign gas-company, which by the deed were recited to pass by the delivery of the certificates, and covenanted with him for further assurance; and by the same indenture the plaintiff, in consideration of such assignment, covenanted to indemnify the defendant against certain partnership debts. Upon the execution of the deed, the certificates of the shares were handed over to the plaintiff, but certain formal acts, required to be done by the law by which the company was regulated, before the property in the shares could be effectually vested in the plaintiff, were not performed. It was held, that, inasmuch as, upon the construction of the whole deed, the plaintiff's covenant of indemnity and the defendant's covenant as to the shares, were legally independent of each other, a breach of the covenant of indemnity by the plaintiff, subsequent to the execution of the deed, did not constitute a ground of defence to a bill by the plaintiff for the specific performance by the defendant of the covenant for further assurance, by performing the formal acts necessary to be *done in order effectually to vest the property of the shares in the plaintiff. [*431 [*432]

Honyman, contra.—The instrument in question is a lease for five years, with a purchasing clause at the expiration of that time; therefore it is void altogether by the statute, or, if not void altogether, it is void as a lease, and so the defendant does not get what he contracted for. The second plea alleges that the instrument declared upon was entered into after the passing of the 8 & 9 Vict. c. 106, and purported to be and was and is a lease of tenements and hereditaments which at the time of the making and passing of the said act was required by law to be in writing, being a lease of tenements and hereditaments for more than three years: and that allegation is not traversed. There are words of present demise, which, before the statute, would clearly have made this a lease. Under the fourth section of the 7 & 8 Vict. c. 76, an agreement such as this might take effect as an agreement to execute a lease: but, since the 8 & 9 Vict. c. 106, s. 8, it is altogether void. [MAULE, J.—The 7 & 8 Vict. c. 76, was a notorious statutory blunder.

It was incongruous and impossible of operation; and its absurdities were so great that the framers themselves had no very distinct notion of its meaning.] That distinction is pointed out in *Tress v. Savage*, 4 Ellis & B. 36 (E. C. L. R. vol. 81). The rule cited from Sheppard's Touchstone and Bacon's Abridgment must be taken subject to this qualification, that the giving the instrument the substituted construction is not in contravention of any statute: nor can that rule apply to a case where it was the intention of the grantee to have the right to purchase the premises at the end of five years, and to have the use of them in the mean time. [JERVIS, C. J.—The intention was, to pass a *433] present *interest. MAULE, J.—Parties must be assumed to have contemplated the state of the law at the time they entered into the contract. The case of the covenant to stand seised is certainly a very strong one.] The statute expressly says that the instrument shall be void. *Tress v. Savage* clearly has no bearing unfavourable to the defendant's view: the same thing had before been determined as to agreements which were void by the statute of frauds; though void altogether, yet, at the end of the term, the tenant was bound to quit without notice: *Doe d. Tilt v. Stratton*, 4 Bingh. 446 (E. C. L. R. vol. 13), 1 M. & P. 183. In *Mayfield v. Robinson*, 7 Q. B. 486 (E. C. L. R. vol. 53), it was not decided that the agreement was a valid agreement, but merely that no stamp was necessary. [MAULE, J.—Do not the court affirm it as an agreement?] It was a mere question of admissibility of evidence. It is submitted that this instrument is void as a lease, and not valid as an agreement. Assuming that the instrument in question, though void as a lease, may still be valid as an agreement, the defendant does not get what he bargained for. The 70*l.* was paid for a lease, and, unless the defendant got a valid lease, he never received the consideration for which he stipulated: *Swatman v. Ambler*, 8 Exch. 72.†

The question on the third plea arises on the stipulation in the agreement that the defendant shall immediately do and execute all acts necessary to transfer and vest the shares in the plaintiff. That evidently means, that he shall do so immediately on the plaintiff's producing his title. The plaintiff is now suing, as well for the rent during the five years, as for the purchase-money for the fee. The meaning of the agreement is, that the defendant is entitled to be satisfied at once as to the title, though he is not to have the conveyance until the expiration of the term. [JERVIS, C. J.—That cannot be *so. The *434] two covenants are independent. The third plea clearly cannot be supported.]

Brown, in reply.—[JERVIS, C. J.—Confine yourself to the first point. What was the intention of the parties here? Why, clearly, to pass an interest in the premises. Can we hold that the primary intention of the parties is to be frustrated, because the agreement cannot take effect

in one way?] In the notes to *Gainsford v. Griffith*, 1 Wms. Saund. 60 (2), it is said: "In all cases where several covenants are contained in a deed, the courts endeavour to ascertain the intention of the parties from an attentive consideration of the whole deed, and construe the covenants either as independent or as restrictive of each other according to such apparent intention." Again, p. 60 a, n. (4),—"The chief object of courts of law, is, to discover the true meaning of the parties, and to construe the covenants accordingly." By the construction contended for on the other side, this contract would be wholly made void. As to the purchase, it clearly was intended as an agreement: and the court will construe it in the only way in which it can have any effect at all, viz. as an agreement. Assuming that the parties did intend to make a present demise for five years, if that intention cannot be carried out, there is no reason why effect should not be given to the more general intention,—that the defendant should have possession of the premises for the five years, and have the option of purchasing them at the end of that time. [CRESSWELL, J.—Suppose you had before you an agreement containing words of present demise, such as before the 8 & 9 Vict. c. 106 would have been held to operate as a lease, would you now say that it was a lease?] It might still have effect as an agreement, though void as a lease. It is impossible to put any limit to the mischief that must *result from holding otherwise. [CRESSWELL, J.—The legislature intended to encounter all the peril you allude to, when they made the alteration in the terms of the enactment in this act from those of the former act.] Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.

The question in this case is, whether the instrument set forth in the declaration is a lease or an agreement. If it is a lease, it is void by the statute 8 & 9 Vict. c. 106, s. 3, and the defendant is entitled to judgment: if it is an agreement, it is not within the statute, and the plaintiff will succeed.

It was admitted, during the argument, that the instrument would have been a lease, if it had been made before the recent statute; but it was contended that it ought, since the passing of that act, to be held to be an agreement only, because, if it is a lease, it is void, and it could not have been the intention of the parties to make a void instrument.

The rule to be collected from all the cases, is, that "the intention of the parties, as declared by the words of the instrument, must govern the construction:" per Lord Ellenborough, in *Poole v. Bentley*, 12 East, 168. And the court will, if possible, put such a construction upon it as will effectuate the intention of the parties, rather than defeat it.

The question, then, is, what was the intention of the parties when this instrument was made? Doubtless, they intended to make an instrument which should have some operation. But, did they intend to make

a lease, or an agreement? If the former, they have not done what they intended, because the lease is void by the statute. The intention of the parties must be collected from the instrument itself. The rule is well *436] explained *by Lawrence, J., in the case of *Morgan v. Bissell*, 3 Taunt. 65,—“Where there is an instrument by which it appears that one party is to give possession, and the other to take it, that is a lease, unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made.” But it is unnecessary to refer to the cases, which are all collected by Sir Robert Comyn in his useful work upon the law of Landlord and Tenant. It is admitted, that, before the statute, this instrument would have been held to be a lease; and, if the true rule be, that the intention of the parties as declared by the words of the instrument, must govern the construction, it is clear that the parties intended this instrument to operate as a lease. It is void as a lease, and the defendant is therefore entitled to our judgment.

J. Brown applied for judgment for the plaintiff on the demurrer to the third plea, it having been conceded during the argument that that plea could not be supported.

JERVIS, C. J.—Our judgment was intended to apply only to the demurrer to the replication to the second plea. We understood that the third plea had been disposed of on the argument. Consequently, the judgment will be for the plaintiff on the demurrer to the third plea, and for the defendant on the demurrer to the replication to the second plea.

Judgment accordingly.

*437] *The Rev. RICHARD GOLDHAM, Clerk, v. The Rev. SAMUEL VALENTINE EDWARDS, Clerk. *June 9.*

To a declaration by A., an incoming, against B., an outgoing incumbent, for dilapidations to the rectory house and premises, B. pleaded, that A., being rector of C., and B. incumbent of D., it was agreed between them, with the consent of their respective patrons and diocesans, that they should exchange their respective livings, and “that A. should not call upon B. to pay for the repairs in the declaration mentioned, or for any or either of them:”—

Held, upon motion for judgment non obstante veredicto on this plea, that it did not necessarily disclose a simoniacal contract.

Held also, that, in pleading a simoniacal contract under the 31 Elis. c. 6, s. 8, it need not be alleged that the agreement was made *corruptly*; but that it is enough if the circumstances disclosed by the plea necessarily show that the agreement was corrupt and contrary to the statute.

THIS was an action by an incoming against an outgoing incumbent, for dilapidations to the parsonage-house and premises.

The first count of the declaration stated, that, by the law and custom of England hitherto used and approved of, all and singular the rectors and vicars of this kingdom for the time being are bound and ought to repair and sustain all and singular the houses, buildings, and tenements

of and belonging to their respective rectories [and vicarages], and leave the same so repaired, supported, and sustained, to their successors, and, in default of so doing, are bound to satisfy so much as should be necessary to be expended or paid for the necessary repairs thereof: That the defendant was rector of the parish church of the parish of Caldecot, in the county of Hertford, and, as such rector, before and at the time of his resignation thereafter mentioned, was, in right of his said rectory, seised in fee of and in the chancel of the said parish church of Caldecot, and of certain houses, buildings, and lands, and of and in divers fences to the said lands belonging: That the defendant, being so seised as aforesaid, resigned the same rectory to the bishop of the diocese to which the said rectory belonged, which bishop then accepted the said resignation thereof, he the said bishop having competent authority to accept the same; whereupon and whereby the said rectory became vacant: That the plaintiff was afterwards, in *due form of [438 law, presented, admitted, instituted, and inducted to the same rectory so void by the resignation of the defendant as aforesaid, and thereby became rector of the same parish church, and became and still continued seised, in right thereof, of and in the said chancel of the said parish church, and of and in the said houses, buildings, lands, and fences, and was the next successor of the defendant of and to the same rectory: Now, the plaintiff in fact said, that, at the time of the resignation of the defendant, the said chancel, houses, buildings, and fences were and still remained greatly dilapidated and out of repair, and in great decay for want of due repairing thereof, and were so left by the defendant when the said rectory so became vacant; and that the expenditure sufficient for the necessary repairing of the said chancel, houses, buildings, and fences, would amount to a large sum of money,—of all which said premises the defendant afterwards, and after the plaintiff was so presented, admitted, instituted, and inducted as aforesaid, had notice, and was then requested by the plaintiff to pay for such necessary repairs as aforesaid, and a reasonable time for the defendant to pay for the same elapsed before this suit, and all things necessary happened to entitle the plaintiff to have the defendant pay for the same; yet that the defendant, contriving and fraudulently intending to injure the plaintiff in this behalf, had not yet paid the plaintiff for such necessary repairs, or for any part thereof, although often requested so to do, but had hitherto altogether neglected and refused, and still did neglect and refuse to pay him the same.

The second count stated, that, by the law and custom of England, hitherto used and approved of, all and singular the vicars of this kingdom for the time being are bound and ought to repair and sustain all and singular the houses, buildings, and tenements of and *belonging to their respective vicarages, and to leave the same, [439 so repaired, supported, and sustained, to their successors, and,

in default of so doing, are bound to satisfy so much as should be necessary to be expended or paid for the necessary repairs thereof: That the defendant was vicar of the parish church of the parish of Newnham, otherwise Newenham, in the county of Hertford, and as such vicar, before and at the time of his resignation thereafter mentioned, was, in right of his said vicarage, seised in fee of and in certain houses, buildings, and lands, and of and in divers fences to the said lands belonging: That the defendant, being so seised as aforesaid, resigned the same vicarage to the bishop of the diocese to which the said vicarage belonged, which bishop then accepted the said resignation thereof, he the said bishop having competent authority to accept the same, whereupon and whereby the said vicarage became vacant: That the plaintiff was afterwards in due form of law presented, admitted, instituted, and inducted to the same vicarage, so void by the resignation of the defendant as aforesaid, and thereby became vicar of the same parish church, and became and still continued seised in right thereof of and in the said houses, buildings, lands, and fences, and was the next successor of the defendant of and to the same vicarage: Now, the plaintiff in fact said, that, at the time of the resignation of the defendant, the said houses, buildings, and fences were and still remained greatly dilapidated and out of repair, and in great decay for want of due repairing thereof, and were so left by the defendant when the said vicarage so became vacant; and that the expenditure sufficient for the necessary repairing the said houses, buildings, and fences would amount to a large sum of money,—of all which said premises the defendant afterwards, and after the plaintiff was so presented, admitted, instituted, and inducted as aforesaid, had due *notice, and was then requested by *440] the plaintiff to pay for such necessary repairs as aforesaid, and a reasonable time for the defendant to pay for the same elapsed before this action, and all things necessary happened to entitle the plaintiff to have the defendant pay for the same; yet that the defendant, contriving and fraudulently intending to injure the plaintiff in that behalf, had not yet paid the plaintiff for such necessary repairs, or for any part thereof, although often requested so to do, but had hitherto altogether neglected and refused, and still did neglect and refuse, to pay him the same: And the plaintiff claimed 500*l*.

The defendant pleaded,—first, as to the first count, that the chancel, houses, buildings, and fences, in the first count mentioned, were not, nor was any part thereof, dilapidated, out of repair, or in decay, nor were they, nor was any part thereof, so left by the defendant, as alleged.

Secondly, as to the first count, that the defendant had not such notice, and was not requested by the plaintiff, as therein alleged.

Thirdly, to the first count, that a reasonable time for the defendant to pay for the said repairs had not elapsed, as alleged.

Fourthly, to the second count, that the said houses, buildings, and fences in the second count mentioned, were not, nor was any part thereof, dilapidated, out of repair, or in decay, nor were they, nor was any part thereof, so left by the defendant, as alleged.

Fifthly, to the second count, that the defendant had not notice, and was not requested, as in the said second count alleged.

Sixthly, to the second count, that a reasonable time for the defendant to pay for the repairs therein mentioned, had not elapsed, as alleged.

Seventhly, that, whilst the defendant was rector of *Caldecot, and vicar of Newnham, as in the declaration mentioned, the plaintiff was chaplain of the Central London District School, *and that the plaintiff and the defendant thereupon, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings in their then state and condition, and that the plaintiff should not call upon the defendant to pay for the repairs in the declaration mentioned, or for any or either of them*; that the said exchange was afterwards, in pursuance of the said agreement, carried into effect, and that the plaintiff thus, and not otherwise, became successor of the defendant in the said rectory and vicarage, as in the declaration mentioned. [*441

Eighthly, as to the first count so far as it related to white-washing the said chancel, and as to the second count so far as it related to painting and whitewashing the buildings therein mentioned, that, whilst the defendant was rector of Caldecot and vicar of Newnham, as in the declaration mentioned, the plaintiff was chaplain of the Central London District School, and that the plaintiff and the defendant thereupon, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings, which exchange was afterwards, in pursuance of the said agreement, carried into effect, and that the plaintiff thus, and not otherwise, became successor of the defendant in the said rectory and vicarage, as in the declaration mentioned; that the matters in the introductory part of that plea mentioned were part of the dilapidations and wants of repair for which this action was brought; that, at the time of the said exchange, the defendant was lawfully possessed, as of his own property, of certain fixtures and effects in and upon the said vicarage, which the plaintiff was desirous of purchasing of the defendant; and that thereupon, in consideration that the defendant, at the request of the plaintiff, would sell and relinquish to the plaintiff *the said fixtures and effects at a reduced price, the plaintiff agreed to accept the same at such reduced price, in satisfaction and discharge of that part of the claim in the declaration mentioned as to which that plea was pleaded; and that the defendant did, in pursuance of the said agreement, sell and relinquish to the plaintiff the said fixtures and effects at such reduced price, and that the

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plaintiff then accepted the same in full satisfaction and discharge of the said part of the claim in the declaration mentioned.

Ninthly, that, before any or either of the said supposed breaches of duty in the declaration mentioned, the plaintiff, otherwise than by either of the agreements in the preceding pleas mentioned, and not by deed, wholly and absolutely absolved, exonerated, and discharged the defendant from the payment of the said moneys, and every part thereof.

The plaintiff joined issue on the first, second, third, fourth, fifth, sixth, and last pleas.

Replication to the seventh plea,—the plaintiff admits, that, whilst the defendant was rector of Caldecot and vicar of Newnham, the plaintiff was chaplain of the Central London District School, as alleged in the seventh plea, and that the plaintiff and defendant, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings, and that the exchange was afterwards, in pursuance of such agreement, carried into effect, and that the plaintiff thereby became the defendant's successor in the said rectory and vicarage, as in the declaration mentioned; *but the plaintiff joins issue on so much of the seventh plea as alleges that [it was agreed that] the plaintiff should not call on the defendant to pay for the repairs in the declaration mentioned, or any or either of them.*(a)

*143]. *Replication to the eighth plea,—And as to the eighth plea, the plaintiff admits, that, whilst the defendant was rector of Caldecot and vicar of Newnham, the plaintiff was chaplain of the Central London District School, as therein alleged, and that the plaintiff and defendant, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings, and that the said exchange was afterwards, in pursuance of the said agreement, carried into effect, and that the plaintiff thus, and not otherwise, became the defendant's successor in the said rectory and vicarage, as in the declaration mentioned; and that the white-washing of the said chancel, and the painting and white-washing the buildings in the eighth pleas referred to, are part of the dilapidations and wants of repair for which this action was brought; but the plaintiff joins issue on the residue of the eighth plea.

At the trial of the issues of fact, before Maule, J., at the last Assizes at Hertford, a verdict was found for the plaintiff on all the issues except the seventh, and on that the jury found for the defendant.

Montague Chambers, in Easter Term last, obtained a rule nisi for judgment as in case of a nonsuit, on the ground that the contract dis-

(a) There were also demurrers to the seventh and ninth pleas, on the ground, as to the former, "that the alleged terms of exchange are simoniacal and void," and as to the latter, "that, if the alleged exoneration was before the plaintiff was successor, he was not in a position to exonerate, and, if after, then that his right to be paid for dilapidations could not be discharged without deed or without a consideration, and that, as no consideration is stated, none can be implied:" but the demurrers were not argued.

closed in the seventh plea was simoniacal and void by the 31 Eliz. c. 6, ss. 5, 8, and 12 Anne, stat. 2, c. 12, s. 2.

Channell, Serjt., and *T. Chambers*, on a subsequent *day in the same term, showed cause.—The ground of this motion is, [*444 that the plea affords no defence to the action, inasmuch as the contract it sets up is simoniacal and void, by the 31 Eliz. c. 6, s. 8. That section enacts, that, “if any incumbent of any benefice with cure of souls, do or shall *corruptly* resign or exchange the same, or *corruptly* take for or in respect of the resigning or exchanging of the same, directly or indirectly, any pension, sum of money, or *benefit whatsoever*, that then, as well the giver as the taker of any such pension, sum of money, or other benefit *corruptly*, shall lose double the value of the sum so given, taken or had; the one moiety, as well thereof as of the forfeiture of double value of one year’s profit before mentioned, to be to the Queen’s Majesty, her heirs and successors, and the other moiety to him or them that will sue for the same, by action of debt, bill, or information, in any of Her Majesty’s courts of record, in which no essoin, &c., shall be allowed.” There are two principal objections to the plaintiff’s right to recover here,—first, that, if the contract stated in the seventh plea be simoniacal, simony should have been replied,—secondly, if it were unnecessary for the plaintiff to reply simony, it must be upon the ground that the plea discloses a contract necessarily simoniacal upon the face of it, and then, the plaintiff being party to it, he is not legally successor in the benefice, and therefore not entitled to sue for dilapidations.

1. Simony, like usury, is a statutable defence on the ground of illegality. It must be pleaded; and it is a necessary ingredient that the contract must be corruptly made. The word “corruptly” is important. In *Barret v. Glubb*, 2 Sir W. Bla. 1052, De Grey, C. J., says: “An advowson is a temporal right; not, indeed, *jus habendi*, but *jus disponendi*. The exercise of that right is, by presentation. The right itself is a valuable right, *and therefore an advowson is held to be assets [*445 in case of lineal warranty: *Doddr. 2, 23*. It is real assets in the hands of the heir: *Robinson v. Tonge*, Dom. Proc. 1780, 2 Stra. 879, 3 Bro. P. C. 556, or 1 Bro. P. C. (Toml. Ed.) 114, 3 P. Wms. 401 (in Canc.) And the trustee or mortgagee of an advowson is bound to present the clerk of the cestui que trust or mortgagor. Thus far it is a valuable right, and properly the object of sale. But the exercise of this right is a public trust, and therefore ought to be void of any pecuniary consideration either in the patron or presentee. It cannot, it ought not to produce any profit. It is not vested in guardian in socage, nor is he accountable for any presentation made during the infancy of his ward. It is held in *Hobart*, 104,(a) that an advowson will not pass by the words ‘commodities, emoluments, profits, and advantages.’ In

(a) In the case of *John London v. The Chapter of the Collegiate Church of the Blessed Virgin Mary of Southwell*.

quare impedit, the patron could at common law recover no damages. In writ of right of advowson, he must lay the esplees in the parson. Simony, as such, was unknown to the common law; though I agree with my Brother Glyn that corrupt presentation was [known]: Burnet's Past. Care, 22. But, what is or is not simony now depends on the statute of the 31 Eliz. c. 6, which did not adopt all the wild notions of the canon law; but has defined it to be a corrupt agreement to present. In Coke's Entries, 516, it is expressed *simoniacè et corruptè*; but the latter is the legal and effective word." Simony, therefore, is not to be inferred from the plea, when the contract is not expressly alleged to have been made *corruptly*. [CRESSWELL, J.—Would not usury be inferred without the word "corrupt," where the plea disclosed a contract for 10 per cent. interest?] *Bebington v. Wood*, Sir W. Jones, 220, is *446] an authority to show that simony is not to be intended where it is not specially pleaded and averred. [CRESSWELL, J.—What you have to show here, is, that the statements in the seventh plea are consistent with the absence of simony.] Taking the 5th and 8th sections of the statute together, all concerned are parties to the corrupt contract. In Bacon's Abridgment, *Simony* (F), a distinction is taken between one who is *simoniacus* and one who is *simoniacè promotus*:—"The person promoted in pursuance of a corrupt contract is at some times *simoniacus*, at other times *simoniacè promotus*. In the former case, wherein he is a party or a privy to the contract, he is liable to suffer more: but, in the latter, although he be quite a stranger thereto, he is to a certain degree involved in the consequences of the contract. The design is, that, if a sense of what becomes himself, and of the duty he owes to the public, will not restrain a patron from being guilty of simony, a regard for the person whom he means to serve may do it." "Neither a *simoniacus* nor a *simoniacè promotus* can sue for tithes, the right thereto being taken away by the corrupt contract." Again, (I), it is said: "The possession of a benefice to which an incumbent has been *simoniacally* promoted, may be recovered by an assize of *darrein presentment*, or by an action of *quare impedit*." Are there any averments in this plea to make up for the want of an allegation of corruption? If two beneficed clergymen agree to exchange their livings in their then state and condition, if it appear that the contract is beneficial to one only, it may be that it is *simoniacal*. But that is not this case. Here, the dilapidations must be assumed to have been nil, or equal in value. [CRESSWELL, J.—Suppose the agreement had been that 50*l.* should be paid for dilapidations on the one side, could the other side say that the real amount of the dilapidations was 300*l.*, and therefore that the contract was *corrupt, without pleading that it was so?] It is submitted not. *447] The jury have found that what was done here was done with the consent of the respective patrons and diocesans, and there is nothing

on the face of the plea which necessarily shows corruption. In *Downes v. Craig*, 9 M. & W. 166,† Parke, B., in the course of the argument, says: "The plea avers that there was an agreement to exchange their respective livings in their then state and condition, and then it is found that there was no specific agreement entered into upon the subject of dilapidations, but, from the conduct of the parties at the time of and for some months after the exchange was agreed and acted upon, it is plain that neither party then contemplated any claim for dilapidations. That might be because they did not know the extent of the dilapidations, and they might conceive that the amount in each was equal." Best, C. J., in delivering his opinion in the House of Lords in the case of *Fletcher v. Lord Sondes*, 3 Bingh. 583, speaking of exchange, says,—"In exchanges, each party proposes to himself some benefit; the one expects to get more profit, the other a more healthy, or agreeable, or advantageous residence. Yet exchanges are expressly allowed by the statute of Elizabeth, because exchanges, though productive of temporal advantages to one or both parties, are not the vile corrupt contracts which were intended to be prohibited by the legislature." It clearly is not every "benefit" that can bring a party within the prohibition of the statute. [CROWDER, J.—The argument on the other side will be, that this a contract for a positive pecuniary benefit to the one side or the other.] There clearly would be no benefit, if there were no dilapidations to the buildings belonging to either living. Suppose the jury here had found that there was a difference of one shilling between the value of the dilapidations of the respective buildings, would they have been *warranted in finding the bargain corrupt? Must there not, to warrant such a conclusion, be some substantial difference? [*448 [WILLIAMS, J.—The presence or absence of corruption must depend upon the *mind* of the parties.] The court will not assume the state of mind which makes the contract corrupt.

2. If the court must necessarily infer simony from the facts stated in the plea, the plaintiff cannot sue, inasmuch as he was a party to the simoniacal contract, and so became the defendant's successor under an illegal contract. The plea shows that the plaintiff only became successor under the illegal contract; and that it was made with the consent of the patron, and consequently the living was void by the 12 Anne, stat. 2, c. 12, s. 2, which, reciting that "whereas some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged," enacts, that, "if any person shall or do, for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any person or persons, take, procure, or accept the next avoidance of or presentation to any benefice

with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon, that then every such presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract; and that it shall and may be lawful to and for the Queen's Majesty, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical *449] *taking, procuring, or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same benefice, dignity, prebend, or living ecclesiastical, and shall also be subject to any punishment, pain, or penalty limited, prescribed, or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice, dignity, prebend, or living ecclesiastical had become vacant, any law or statute to the contrary in any wise notwithstanding." [CRESWELL, J.—That only applies where the patron is concerned in the illegal contract. That explains why the next turn is given to the Queen.] Here, the plea shows that the patron was a consenting party to the illegal bargain, if illegal it were.

Montague Chambers and *Hawkins*, in support of the rule.—The benefit gained by the outgoing rector, was, that he was not to be called upon to pay for dilapidations. There was no engagement on his part that he would not call for them from the plaintiff. It clearly was a corrupt agreement within the 31 Eliz. c. 6, s. 8. It was not necessary that the word corruptly should be found in the plea: it is enough if it discloses facts from which the court can with reasonable certainty collect that there was corruption,—especially where the party himself is stating the agreement he has made. If so, no answer is given to the plaintiff's claim, unless it is shown that he has not such a possession of the living as to entitle him to sue for these dilapidations. The statute of Anne only applies to a case where the party presented is the party guilty of the illegal act. One of the consequences, is, that the patron loses the turn, and the Queen gets it. Here, the bishop and patron sanction the exchange of the two livings, but not the terms of it. If it were necessary, the case of *Downes v. Craig*, 9 M. & W. 166,† is a conclusive authority to show that such a bargain as this is void. It is said that the repairs here might have been of about equal value on the one side and on the other. That is extremely unlikely, especially as the one preferment is a school, in respect of which there could be no dilapidations chargeable on the incumbent. [CRESWELL, J.—There must have been a benefice and a living, otherwise there would have been no "respective patrons and diocesans.""] The plea does not allege mutual dilapidations.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.(a)

This case stood over for consideration; and, my learned Brothers and myself having looked into the authorities, I proceed to state the result of our deliberation.

It was an action by one clergyman against another to recover the amount of dilapidations to the rectory of Caldecot and the vicarage of Newnham, of which the defendant had been rector and vicar respectively. The defendant pleaded various pleas, and amongst them one—the seventh,—to the following effect:—that, whilst the defendant was rector of Caldecot and vicar of Newnham, as in the declaration mentioned, the plaintiff was chaplain of the Central London District School; and that the plaintiff and defendant thereupon, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings in their then state and condition, *and that the plaintiff should not call upon the defendant to pay for the repairs in the declaration mentioned, or for any or either of them*; and that the *exchange was afterwards, [451 in pursuance of the said agreement, carried into effect, and the plaintiff thus, and not otherwise, became successor of the defendant in the said rectory and vicarage. At the trial before my Brother Maule at the last Spring Assizes at Hertford, a verdict was found for the defendant upon the issue joined on the replication to that plea, which traversed the agreement therein alleged; and a motion was made in the last term to enter judgment for the plaintiff non obstante veredicto on that issue. The ground of the application was, that the plea disclosed a contract that was simoniacal and void, and consequently afforded no defence to the action.

In the view which we take of this case, it is not necessary to determine whether the alleged agreement amounts to a simoniacal contract. The objection was founded upon the 8th section of the statute 31 Eliz. c. 6, explained by the 12 Anne, stat. 2, c. 12, s. 2, by which certain penalties are imposed on persons guilty of corruptly bargaining for the resignation or exchange of benefices. The 8th section of the 31 Eliz. c. 6, enacts, that, “if any incumbent of any benefice with cure of souls do or shall corruptly resign or exchange the same, or corruptly take for or in respect of the resigning or exchanging of the same, directly or indirectly, any pension, sum of money, or benefit whatsoever, that then, as well the giver as the taker of any such pension, sum of money, or other benefit, corruptly, shall lose double the value of the sum so given, taken, or had.” We deem it to be unnecessary to consider whether the transaction which took place here did or did not amount to a simoniacal contract, because, on this motion for judgment non obstante veredicto, unless the statement in the plea *necessarily* leads to the conclusion that the contract was simoniacal, and therefore void,—

(a) The judges present at the argument were, Jervis, C. J., Crosswell, J., Williams, J., and Crowder, J.

*452] or, in other words, if any state of circumstances *may be assumed to exist, consistently with the allegations in the plea, in which the contract would be free from the taint of simony,—we must hold the contract to be valid, and the objection cannot prevail. The matter was extremely well put by Mr. *T. Chambers*; though we cannot concur with him in thinking that the word “*corruptè*” ought necessarily to be found in the plea, to found the objection on the score of simony; for, we think, that, if it necessarily appears from the surrounding circumstances that the agreement was corrupt, the case is within the statute. But we do agree with him, that, if we can conceive any state of circumstances which might exist consistently with this plea, to show that the contract between the parties was not simoniacal, this rule must be discharged. Now, it is perfectly consistent with this plea that many such circumstances might have existed. The substance of the plea is, that, on the exchange of their respective livings, it was agreed between the parties that the plaintiff should not call upon the defendant to pay for the dilapidations. The plea is not put forward for the purpose of showing the whole of the transaction between the parties, or to show that the contract was one which could not be enforced in a court of law, but simply for the purpose of excusing the defendant from the charge made against him by the plaintiff in his declaration. Where the party is charged in the declaration with a liability, founded upon the custom of the realm, to pay for dilapidations, it is enough for the defendant to say that there was a subsisting valid contract under which the plaintiff agreed to discharge him from liability in respect of those dilapidations. It is quite possible that there might have been a valid contract between the parties to that effect. For instance, the dilapidations of the premises belonging to the plaintiff's benefice may have been equivalent, or about equal, in amount to those of the buildings *453] *belonging to the exchanged benefice, and therefore the parties may not have thought it worth while to go through the unnecessary form of the valuation and payment of the amount from the one to the other, when each would have to pay or expend substantially the same sum. Again, it may happen,—even admitting the defendant's liability to dilapidations, which to a certain extent the plea does admit,—that the dilapidations on either side were so insignificant in amount as to make it not worth the expense of employing surveyors to value them; and so, upon the exchange of the livings, the respective incumbents consent to forbear all demand upon each other in respect thereof. Either of these states of circumstances is perfectly consistent with a legal and honest state of things. Why should the parties be compelled to call in surveyors, when upon their own inspection they find the dilapidations very trifling, or so nearly equal that they may fairly agree to set them off against each other, and make no claim on either side? I think that would be a perfectly good contract. No benefit is improperly

derived from the exchange of the benefices on one side or the other. The contract, therefore, being, as we think it is, consistently with the seventh plea, a perfectly legal and valid contract, we think the rule for entering judgment non obstante veredicto thereon must be discharged.

Rule discharged.

*COOPER v. PEGG. May 23.

[*454

By an order of reference, in an action for an injury to the plaintiff's reversion by making a drain into his premises, a verdict was directed to be entered for the plaintiff, claim 500*l.*, costs 40*s.*, subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper,—the arbitrator to have all the same powers as the court or a judge sitting at Nisi Prius, and the costs of the suit to abide the event of the award. The arbitrator by his award found all the issues in the action in favour of the plaintiff, except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages should be reduced to one farthing; and he further ordered the defendant to pay the plaintiff 5*l.*; and that the plaintiff should at his own expense make a certain drain:—

Held, that the plaintiff was not, in the absence of a certificate under the 3 & 4 Vict. c. 24, s. 2, entitled to the costs of the cause.

THIS was an action upon the case for an injury to the plaintiff's reversion, by the alteration of a drain under certain premises in the occupation of the plaintiff's tenants. The defendant pleaded not guilty and several other pleas upon which issue was joined.^(a)

By an order of reference, a verdict was directed to be entered for the plaintiff, claim 500*l.*, costs 40*s.*, subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper,—the arbitrator to have all the same powers as the court or a judge sitting at Nisi Prius, and the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator.

By a judge's order, made by consent, one John Hopper and one Mary Woodhouse, against whom two other actions had been brought by the plaintiff in respect of the same subject-matter, and two other persons named Orme and Dunstan, were allowed to come in as parties to the reference.

The arbitrator by his award found all the issues in this action in favour of the plaintiff, except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages be reduced to one farthing; and he ordered that the defendant should pay the plaintiff 5*l.*, and that the plaintiff should at his own expense make certain alterations in the existing drain.

In the other two actions of Cooper v. Woodhouse and Cooper v.

^(a) See the pleadings, order, and award, *antè*, p. 264.

Hopper, the arbitrator found all the issues in favour of the plaintiff; and he ordered that Mary Woodhouse should pay to the plaintiff 10*l.*, and that Hopper should also pay to the plaintiff the like sum, at the time and place therein mentioned: and Orme, against whom no action had been brought, was ordered to pay to the plaintiff 5*l.*

The master taxed the plaintiff's costs in the actions against Mary Woodhouse and John Hopper, but refused to tax his costs in the action against Pegg, on the ground, that, having recovered only *one farthing* damages in the action, and there being no certificate under the 3 & 4 Vict. c. 24, s. 2, the plaintiff was not entitled to the costs of the cause.

Baddeley now moved for a rule calling upon the defendant to show cause why the master should not be at liberty to tax those costs.—Although technically the plaintiff has recovered only *one farthing* damages in the action, yet, inasmuch as by the order of reference the costs of the action were to abide *the event of the award*, and upon the whole award the event is substantially in favour of the plaintiff, and he gets from the defendant under it 5*l.* in addition to the farthing, the plaintiff is clearly entitled to the costs of the action. [JERVIS, C. J.—You want to have the costs of a cause in which you have recovered only one farthing damages, because the order of reference says that the costs of the cause shall abide the event of *the award*, and the *award* gives *456] the plaintiff 5*l.* besides the farthing damages in the action?] *Precisely so. It is by the award with reference to the action that the plaintiff recovers the 5*l.*, though not particularly as damages in the action. *Prima facie*, the plaintiff is entitled to costs, by the statute of Gloucester, 6 Ed. 1, c. 1; and there is no statute which takes them away; for, Lord Denman's Act, 3 & 4 Vict. c. 24, s. 2, has nothing to do with the matter, because here the claim is, to recover costs in respect of the event of the award, and not of the verdict of the jury, or of that power which is substituted for the jury. The plaintiff recovers by the event of the award 5*l.* 0*s.* 0½*d.*, and has substantially his whole rights decided in the action in his favour. The other two actions are decided entirely in the plaintiff's favour. [JERVIS, C. J.—He has got the costs of those actions, though I very much doubt that he was entitled to them.] There are cases which show that a plaintiff who has got an award in his favour in an action, is entitled to costs, although upon the whole matter the balance is against him. Thus, in *The Highgate Archway Company v. Nash*, 2 B. & Ald. 597, by rule of court, a cause and all matters in difference were referred to a barrister, and the costs of the cause were to abide the event of the award. The arbitrator directed the verdict to be entered for the plaintiffs, but that they should not take out execution for *the debt* until they had paid a larger sum to the defendant: and it was held that the plaintiffs' attorney might still take out execution for *the costs*,—Abbott, C. J., saying, "*The costs follow as a legal consequence of*

the award; and the writ of execution, though taken out for the debt and costs, is only endorsed to levy the latter, and is therefore no breach of that award: for, although, in case there had been cross-actions, the defendant would have been entitled to have set off one judgment against the other, he would still have been liable to the costs of the plaintiffs' attorney." So, in *Anonymous*, 1 J. P. Smith, 426, on a *rule to show cause why the master should not tax the costs for [*457 the plaintiff, &c., it appeared that an action of trover for corn, &c., had been referred to an arbitrator, with an agreement that the costs of the action should abide the event. The arbitrator, instead of awarding a verdict to be entered for the plaintiff, awarded him a right of coming into a certain barn, to thrash his corn there, and directed that the incoming tenant should prepare the barn for the outgoing tenant, the plaintiff, and permit him to thrash out his corn there; but he had omitted to give the plaintiff his costs, and direct a verdict to be entered. It was contended for the plaintiff, that, although this was an award of a thing to be performed by the defendant, instead of giving formally a verdict to be entered in the action, yet, the *event* being substantially in his favour, the plaintiff was entitled to his costs. And of that opinion was the court; and Le Blanc, J., observed that it was agreed that the costs were to abide the "event of the award," and not "of the action." And, upon *Swinglehurst v. Altham*, 3 T. R. 138, being cited for the defendant, Lawrence, J., said: "That was a case in which the *defendant* was not liable to costs at all." And the rule was made absolute. *Hemsworth v. Brian*, 1 C. B. 131 (E. C. L. R. vol. 50), 2 D. & L. 844, and *Reeves v. M'Gregor*, 9 Ad. & E. 576 (E. C. L. R. vol. 36), 1 P. & D. 372, have some bearing upon this question. [CRESSWELL, J.—What was the event of the action here, as between Cooper and Pegg?] For the plaintiff. [CRESSWELL, J.—With one farthing damages; and he has part of the first issue found against him.] But he also gets 5*l*. [CRESSWELL, J.—How much would the making of the drain cost him?] That was a thing to be done for his own benefit. [CRESSWELL, J.—The arbitrator would hardly have power to order the plaintiff to do something for his own benefit, which would not be to the interest of the defendant. If I were *to conjecture, I should say that the drain was to be made for the [*458 benefit of all the parties.] The event of the award is in the plaintiff's favour.

JERVIS, C. J.—I think there should be no rule in this case. The plaintiff has brought an action which turns out to be frivolous. The cause and all matters in difference being referred, the arbitrator finds all the issues in the cause, except a portion of the first issue, in favour of the plaintiff, and he directs that the verdict be entered for him with one farthing damages. In addition to the farthing, the arbitrator directs the defendant to pay the plaintiff 5*l*.; but he also directs that

the plaintiff shall make a certain drain. It is plain that the size of the drain was important to all the parties to the reference. I cannot under these circumstances undertake to say that "the event of the award" is in favour of the plaintiff. The arbitrator must be supposed to intend the legal result of his finding. I think the plaintiff is entitled to no costs.

The rest of the court concurring,

Rule refused.

***459] *SWEET and Others v. BENNING and LOVELL. June 8.**

The plaintiffs were the proprietors of a weekly paper called "The Jurist," which consisted principally of reports of decisions in the various superior courts of law and equity, supplied by barristers employed by the plaintiffs for that purpose under a verbal arrangement to the effect that they should furnish reports of such cases as they thought desirable for publication in *The Jurist*, upon the terms of being paid a given price per sheet,—the reporters making no express reservation of a right to publish the cases themselves, and there being no express stipulation that the copyright should belong to the plaintiffs,—nothing, in fact, being said upon the subject. Attached to each report was a head-note consisting of a short or compendious statement of the decision in each case.

The defendants, who were the publisher and the proprietor of a work called "The Monthly Digest,"—a work published at the beginning of each month, and consisting of the side or marginal notes of all the reports published during the preceding month, including those published in *The Jurist*, analytically arranged under the appropriate heads or titles,—copied therein certain of the head-notes of the reports in *The Jurist*, as well as the marginal or side notes of the other reports; The number of head-notes taken from *The Jurist* amounting to about one-twentieth of the whole of each monthly number of the Digest:—

Held,—upon a special case on which the court were to be at liberty to draw such inferences from the facts stated that a jury would be warranted in drawing,—first, that the plaintiffs had copyright in the reports so furnished to *The Jurist*,—secondly (Maule, J., dissentiente), that the defendants were guilty of piracy.

THIS was an action for piracy. The declaration stated, that the plaintiffs were the proprietors of a periodical work called "The Jurist," and of the copyright therein, and of and in all the articles and reports therein, of which periodical work an entry had before this suit been by the plaintiffs duly made in the registry book of the Stationers' Company, as required by the statute in that behalf: Yet that the defendants, wrongfully, and without the consent in writing of the plaintiffs, or either of them, printed for sale, and sold, in a periodical work called "The Monthly Digest," divers portions of the said reports contained in the plaintiffs' said periodical, and in which the plaintiffs had such copyright as aforesaid, and thereby pirated the said reports, and injured the plaintiffs in their said copyright, and diminished their profits of and in the same: And the plaintiffs claimed 500*l*.

The defendants pleaded,—first, not guilty,—secondly, that the supposed offences and alleged causes of action did not, nor did any of them, accrue within twelve calendar months before the commencement of this
 *460] suit,—*thirdly, that the copyright of and in the said reports contained in the plaintiffs' said periodical and periodical book called

The Jurist, or of and in any or either of the said reports, was not, nor was any part thereof, the property of the plaintiffs, as alleged.

The following notice of objections was delivered with the defendants' pleas:—

“Take notice that the defendants mean to rely, on the trial of this action, upon the following objections, viz.

“1. That they have not committed the wrongful act as alleged in the declaration:

“2. That any act they have done, or may have done, was no piracy of the said book and periodical called The Jurist, or of any of the articles or reports therein, or of any part thereof:

“3. That the book and periodical work called The Monthly Digest, was not, nor was any number or part thereof, a piracy of the said work and periodical called The Jurist, or of any part or parts or portions thereof:

“4. That the said supposed offences and causes of action alleged in the declaration did not, nor did any of them, accrue within twelve calendar months before the commencement of this suit:

“5. That the said reports of which a piracy is alleged by the plaintiffs, were articles and portions of the said periodical book and periodical called The Jurist, and were composed for publication in and as part of the said periodical, by persons employed for such purpose by the plaintiffs as publishers and proprietors of the said periodical; but that such reports were not, nor were any or either of them, so composed under such employment, on the terms that the copyright therein should belong to the plaintiffs, being such proprietors and publishers; and such reports were not, nor were any or either of them, paid for by such plaintiffs, being such publishers and proprietors; and, consequently, according to the statute 5 & 6 Vict. c. 45, the copy- [461
right in the said reports, or any or either of them, was not, nor was any part thereof, the property of the said plaintiffs, but the same was the property respectively of such person or persons who under such employment so composed as aforesaid all or any of such reports:

“6. That, although the defendants admit that the plaintiffs were the proprietors of the said periodical book and periodical called The Jurist, yet they the defendants say that the copyright in the said reports, or any or either of them, composed for publication in and as part of the said periodical, has not, nor has any part thereof, become, pursuant to the statute, the property of the plaintiffs, being proprietors and publishers of such periodical:

“7. That the defendants say that the title of the said periodical book and periodical is, ‘The Jurist;’ that the said periodical was first published on the 14th day of January, 1837, at No. 3, Chancery Lane, in the city of London; that the names of the persons who respectively

composed the said reports for publication in and as part of the said periodical as aforesaid, are, Tenison Edwards, Francis Fisher, Edward Eben Kay, Matthew Baillie Begbie, William Baliol Brett, Henry Macnamara, George Francis, William Paterson, William Mills, William Mawdesley Best, George Young Robson, Charles Marett, and George James Philip Smith, Esqs., and James Parker Deane, Doctor of Civil Law; that such persons were the authors of such reports so respectively composed by them, and were respectively the proprietors of the copyright therein, pursuant to the statute:

"8. That each of the said persons so named as aforesaid, who so *462] composed as aforesaid any one or more of *the said reports, was the author of the same, and the proprietor of the copyright therein, pursuant to the statute:

"9. That, under the above circumstances, there being no such terms of prior agreement, and no such payment on the part of the plaintiffs, as required by the statute, the copyright in the said reports, or any or either of them, so published in the said periodical as aforesaid, cannot, nor can any part thereof, have become or have been the property of the plaintiffs, as alleged by them.

"Dated this 30th of May, 1853."

Issue having been joined, the cause came on for trial before Cresswell, J., at the first sitting in Michaelmas Term, 1853, when a verdict was taken for the plaintiffs, damages 40s., subject to the opinion of the court upon the following case:—

The plaintiffs are law publishers and booksellers, and are and have been from the time of its first publication proprietors and publishers of the weekly periodical called *The Jurist*, which has been published every week ever since the 14th of January, 1837, the date of its first publication.

On the 30th of March, 1853, the plaintiffs caused the following entry to be made at Stationers' Hall, which entry was proved at the trial:—

"Entered, 30th March, 1853.

"Form of requiring entry of proprietorship.

"We, Henry Sweet, of No. 1, Chancery Lane, in the city of London, and Valentine Stevens, Richard Stevens, and George Smith Norton, of Bell Yard, Lincoln's Inn, in the county of Middlesex, do hereby certify that we are the proprietors of the copyright of a weekly periodical work intituled *The Jurist*; and we hereby require you to make entry in *463] the register book of the Stationers' Company of our proprietorship of *such copyright, according to the particulars underwritten:—

Title of Book.	Name of Publisher, and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of first Publication.
The Jurist.	Henry Sweet, No. 3, Chancery Lane, in the City of London.	Henry Sweet, of No. 3, Chancery Lane, in the City of London, Valentine Stevens, Richard Stevens, and George Smith Norton, 26, Bell Yard, Lincoln's Inn, in the County of Middlesex.	Vol. 1, No. 1, 14th January, 1837. Date of Publication of Number first published after the passing of the Act 5 & 6 Vict. c. 45. Vol. 6, No. 286. 2d July, 1842.

"Dated this 14th day of February, 1853.

(Signed)

"HENRY SWEET.

"VALENTINE STEVENS.

"RICHARD STEVENS.

"G. S. NORTON."

"Witness,
"F. NICOL."

The court was to be at liberty to refer to all or any of the numbers or volumes of *The Jurist* and the *Monthly Digest* hereinafter mentioned, and to all the books and reports cited in the numbers of the said *Monthly Digest*, and herein complained of, and all other law reports and digests, for any purpose necessary to the decision of the case, and to draw all such inferences of fact as a jury would be authorized to draw.

The reports of decided cases in *The Jurist* are, and always have been, supplied by gentlemen of the Bar, whose names appear at the top of those reports respectively. These gentlemen have been and are employed by the plaintiffs for the purpose; and they compose and furnish with and as part of their report a side or head note or compendious statement of the decision in each case. In *The Jurist*, the said note appears at the head *of each report. *The arrangement between the plaintiffs and these gentlemen was verbal, and to the effect* [*464 *that the reporters should furnish the plaintiffs with reports of such cases as they thought desirable for publication in The Jurist, upon the terms of being paid so much per printed sheet. There was no reservation by them of any right to publish the cases themselves, or of any copyright in such cases; nor was it expressed between the parties that the copyright should belong to the plaintiffs. In fact, nothing passed between the parties on the subject.*

The reports, however, have always been made exclusively for *The Jurist*, under the employment before mentioned, and have always been inserted without alteration.

All the cases, the piracy of which is complained of, were duly paid for, according to the terms of the employment.

The plaintiffs are the proprietors of *Harrison's Digest*; and they publish annually a *Digest* as a supplement to that work.

The plaintiffs, Stevens & Norton, are the proprietors and publishers of *Jeremy's Digest*.

These Digests, and other Digests of a similar nature, are compiled from the head or side notes of the reports published during the year.(a) No leave is asked for such publication, or considered necessary,—the plaintiffs respectively, or some of them, being entitled to the copyright of the greater portion of the reports referred to in such Digests.

The defendants are the proprietors of a periodical called “The Monthly Digest,”—five numbers of which accompanied the case, and were the numbers given in evidence at the trial of this action. In the *465] compilation of such Digest, the defendants had recourse to the *various publications then extant, including *The Jurist*, in which the cases were reported, and in some instances to notes of the defendant Lovell taken in court when the cases in those instances were argued. In all the cases in which reference is solely or first made to *The Jurist*, the side-notes are copied from *The Jurist*.

The number of cases purporting to be digested by the defendants in the five numbers given in evidence, range from three hundred to four hundred in each number; and the number of such cases in which the side-notes have been copied from *The Jurist*, are as follows:—Number 1, eleven cases; number 2, thirteen cases; number 3, twenty-six cases; number 4, twelve cases; number 5, thirteen cases.

The questions for the opinion of the court, are,—

First, whether the copyright in the reports in *The Jurist*, or in the head or side notes thereof, or in both, belongs to the plaintiffs:

Secondly, if so, whether the publication in *The Monthly Digest* of the said head or side notes is or is not a piracy of the plaintiffs’ said copyright.

If the opinion of the court should be in favour of the plaintiffs upon the points both of copyright and piracy, the verdict now entered for the plaintiffs for 40s. is to stand, with the certificate given at the trial to entitle the plaintiffs to costs. If not, the verdict is to be set aside, and a nonsuit entered.

Lush (with whom was *Byles*, Serjt.), for the plaintiffs.(b)—The first question turns upon what is the fair inference to be drawn from the statement in the special case, as to the circumstances under which the *466] reports *are furnished to *The Jurist*, with reference to the Copyright Act of 5 & 6 Vict. c. 45. By the 11th section of that act, the entry in the book of registry kept at Stationers’ Hall is declared to be “*prima facie* proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebut-

(a) This statement is inaccurate so far at least as regards those volumes of *Jeremy’s Digest* which have been edited by Mr. William Tidd Pratt.

(b) The points marked for argument on the part of the plaintiffs were as follows:—

“First. That the facts stated in the case, and reasonable inferences therefrom, entitle the plaintiffs to the copyright in the reports and the side or head notes, or at all events in the latter:

“Secondly. That the publication of such side or head notes in manner and for the purpose stated, amounts to an infringement of such copyright.”

ted by other evidence." The question, therefore, will be, whether there is anything in the case to rebut that *primâ facie* proof. Now, the 3d section enacts "that the copyright in every book which shall after the passing of this act be published in the lifetime of its author, shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns." The 18th section vests in the publisher or proprietor of any periodical work a qualified copyright, reserving to the writer the absolute reversion after the expiration of twenty-eight years, for the remainder of the term given by the former section. The words of that section are material. It enacts, "that, when any publisher or other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed, or shall employ, any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions, shall have been or shall hereafter be composed under such employment, *on the terms that the copyright *therein shall belong to such proprietor, projector, publisher, or* [*467 *conductor, and paid for by such proprietor, projector, publisher, or conductor,* the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act (s. 3); except only, that, in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this act: Provided always, that, during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly, without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid, to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition

when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid." The facts stated in the separate case show such a contract between the plaintiffs and the persons who furnish these reports *468] for *The Jurist*, *as to confer upon the former all the rights intended to be conferred upon the proprietors of periodical works by the 18th section. The statement in the case,—from which the court are to draw all such inferences of fact as a jury would be authorized to draw,—as to the arrangement under which the reports are prepared for *The Jurist*, is, that such arrangement was verbal, and to the effect that the reporters should furnish the plaintiffs with reports of such cases as they (the reporters) thought desirable for publication in *The Jurist*, upon the terms of being paid a certain price per sheet,—there being no *express* agreement that the copyright should be the plaintiffs', nor any *express* reservation of copyright in the reporters themselves. It would be absurd to suppose that the plaintiffs would employ and pay persons to furnish these reports for their work, if they might be copied with impunity the next day by any person who chose. [MAULE, J.—One might almost infer, without the aid of an act of parliament, that one who employs another to write an article, or to make anything else for him, is the owner or proprietor. CRESSWELL, J.—Suppose any gentleman sends a report or an article to a newspaper, being employed by the proprietor for that purpose, would not the proprietor have copyright?] It is submitted that he would.

2. The next question is, whether the use the defendants have made of the plaintiffs' work amounts to piracy. As to that, the admitted facts are these:—The gentlemen who furnish the reports to *The Jurist* compose and furnish, with and as part of their reports, a side or head note, or compendious statement of the decision in each case. The defendants, in compiling their *Monthly Digest*, copied these side or head notes verbatim, to the extent referred to in the special case. This, it is submitted, they had no right to do. The quantity taken *469] from the plaintiffs' work makes no difference. The *defendants had no right to take any, unless for the purpose of quotation, or comment, or criticism. In *Bramwell v. Halcomb*, 3 Mylne & Cr. 737, it having been contended on the part of the plaintiff, amongst other things, that the quantity of his book which had been quoted by the defendant, would be an unfair quantity, even if the defendant had avowed that he took it from the plaintiff; and *Mawman v. Tegg*, 2 Russ. 385, being referred to,—the Lord Chancellor (Lord Cottenham) said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity. In my view of the law, Lord Eldon, in *Wilkins*

v. Aikin, 17 Ves. 422, put the question on a most proper footing. He says, 'The question upon the whole is, whether this is a legitimate use of the plaintiff's publication, in the fair exercise of a mental operation, deserving the character of an original work.' Now, the side-note of a report, for purposes of reference, is unquestionably the most valuable part of the work. Is it any excuse, then, for the defendants' piracy, that they work up that which they take from the plaintiffs, with other matter purloined from other sources, and form the whole up into a digest,—an alphabetical arrangement of the cases under familiar heads? *Campbell v. Scott*, 11 Simons, 81, comes very near to this case. The defendants published a work containing an original essay on modern English poetry, biographical sketches of forty-three modern poets, and selections from their poems, amongst which were six short poems, and parts of longer poems, the copyright whereof belonged to the plaintiff. The selections constituted altogether the bulk of the defendants' work; but were alleged to have been introduced into it for the purpose of illustrating *the essay. The court restrained the publication of the defendants' work, as being an infringement of the plaintiff's [*470 copyright. The Vice-Chancellor (Shadwell), in giving judgment, says: "In this case, the legal right is *prima facie* quite clear with the plaintiff; because it is not denied that the extracts complained of are taken, literally as they stand, from the plaintiff's work. Then, is the work complained of anything like an abridgment of the plaintiff's work, or a critique upon it? Some of the poems are given entire; and large extracts are given from other poems: and I cannot think that it can be considered as a book of criticism, when you observe the way in which it is composed. It contains 790 pages, 84 of which are taken up by a general disquisition upon the nature of the poetry of the nineteenth century: then, without any particular observation being appended to the particular poems and extracts from poems which follow, there are 758 pages of selections from the works of other authors; and therefore I cannot think that the work complained of can, in any sense, be said to be a book of criticism. If there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them, and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay, then there follows a mass of printed matter, which, in fact, constitutes the value of the volume. Then it is said that there is no *animus furandi*: but, if A. takes the property of B., the *animus furandi* is inferred from the act. Here, there is a very distinct taking, and, in my opinion, it has been done in a manner which the law will not permit. *Roworth v. Wilkes*, 1 Campb. 94, was a case in which 75 pages of a treatise containing 118 pages, were taken and inserted in a very voluminous work, *The Encyclopædia*

*471] *Londinensis; and, although the matter taken formed but a very small portion of the work into which it was introduced, the jury found for the plaintiff, who was the author of the treatise. I do not think that it is necessary for me to consider whether the selections in this case are the very cream and essence of all that Mr. Campbell ever wrote; but it is pretty plain that they would not have been inserted in the defendant's work, unless the party who selected them thought that they were very attractive in themselves. However, it so happens, that, in turning over the pages of the defendant's publication, I find an extract from *The Pleasures of Hope*, which is the only part of that poem of which I have a distinct recollection; and I have reason to suppose that it is a very striking passage, because it has remained impressed upon my memory for so many years." So, here, the marginal notes are taken, because they are practically the most useful part of the work. The case of the *Encyclopædia Londinensis*,—*Roworth v. Wilkes*, 1 Campb. 94,—is also a very analogous case, a digest or a dictionary very closely resembling an encyclopædia in some respects. Lord Ellenborough there says: "The question is, whether the defendant's publication would serve as a substitute for the plaintiff's. A review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort; it is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced. A compilation of this kind may differ from a treatise published by itself; but there must be certain limits fixed to its transcripts: it must not be allowed to sweep up all modern works, or an encyclopædia would be a recipe for
*472] completely breaking down literary *property." There, a portion only was taken,—the quantity, according to *Bramwell v. Halcomb*, being immaterial,—and taken for the purpose of making an entirely new and distinct work. *Bell v. Walker*, 1 Bro. C. C. 451, shows the distinction between a piratical appropriation and a fair abridgment. That was a motion for an injunction to restrain the defendants from publishing a book, entitled "*Memoirs of the Life of Mrs. Bellamy*," which the bill stated to be pirated from a book called "*An Apology for the Life of George Ann Bellamy*." Affidavits were produced of Mrs. Bellamy being the author of this latter work, and that she had sold the property of the copy to the plaintiff, who had printed it in five volumes, which sold for 15s. The book against which the injunction was prayed was in one volume, and sold for 2s. 6d. Passages were read from each to show that the facts and even the terms in which they were related in this, were taken frequently verbatim from the original work. The Master of the Rolls (Sir Thomas Sewell) said: "If this was a fair bonâ fide abridgment of the larger work,

several cases in this court had decided that an injunction should not be granted. It had been so determined with respect to Dr. Hawkesworth's *Voyages*. He should not at present decide whether it was such, or a piracy from the former; but he had heard sufficient read to entitle the plaintiff to an injunction, until answer and further order." A *bonâ fide* abridgment may fairly be said to constitute a new work. But there is no case in which a party has been allowed to copy the very words of an author, except for the purposes of argument, or criticism, or comment; and even that, if colourably done, will afford the party no protection: *Butterworth v. Robinson*, 5 Ves. 709, where the work consisted of an abridgment of the Term Reports, alphabetically arranged under heads and titles, the abridgment consisting merely in leaving out the arguments of counsel,—as in *Bott's Poor Law Cases*. In *Sweet v. Maugham*, 11 Simons, 51, upon a motion to dissolve an injunction granted against *The Legal Observer* for a piracy of reports from *The Jurist*, "taken by gentlemen at the Bar under verbal agreements with the proprietors," Vice Chancellor Shadwell said: "The injunction, as it is now expressed, does not extend to the reports which have been taken from a common source; but to those only which have been copied from *The Jurist*, and which are the plaintiffs' copyright. As it is quite plain that an injury has been done by the defendants, I shall continue the injunction as it now stands, and let the plaintiffs bring such action as they may be advised. The defendants must admit that the gentlemen who furnished the reports to *The Jurist* have assigned their copyrights therein to the plaintiffs." As to the case of *Saunders v. Smith*, 3 Mylne & Cr. 711,—which arose upon the publication of *Smith's Leading Cases*,—nothing was decided there, except that the plaintiffs had by their conduct precluded themselves from asking the aid of a court of equity.

Butt (with whom was *P. Burke*), *contrâ.(a)*—1. The 5 & 6 Vict. c. 45, repeals the former acts relating to copyright, 8 Anne, c. 19, 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156. The 3d section absolutely vests in the author and his assigns the copyright in every book,—*which, [*474 by s. 2, includes "any volume, part or division of a volume." Without, therefore, the aid of the 18th section, which provides for the case of periodicals, unless the plaintiffs showed an assignment, the copyright must remain in the authors. Now, under s. 18, there are two conditions to be performed, to vest the copyright in articles written for periodicals in the proprietors of such periodicals: in the first place, the

(a) The points marked for argument on the part of the defendants, were as follows:—

"1. That, although the plaintiffs may be the proprietors of *The Jurist*, the copyright in the reports therein does not belong to them, because such reports were not composed by the respective authors of them on the terms that the copyright therein should belong to the proprietors of *The Jurist*:

"2. That the defendants' use in the Digest of the reports in *The Jurist*, is not a piracy, but is a fair and unprejudicial dealing with such reports, as allowed by custom and law."

articles must be written or composed under an employment for that purpose on the terms that the copyright therein shall belong to the proprietor of the periodical; and, in the next place, it is a condition precedent that it shall have been paid for by such proprietor. Although, therefore, the gentlemen who furnish these reports for *The Jurist* are employed for that purpose, the copyright remains in them, unless the reports are composed on the express terms that the copyright therein shall belong to the proprietors of *The Jurist*. Now, all that is stated in the case upon that subject, is this,—“The reports of decided cases in *The Jurist* are, and always have been, supplied by gentlemen of the Bar. These gentlemen have been and are employed by the plaintiffs for the purpose. The arrangement between the plaintiffs and these gentlemen was verbal, and to the effect that the reporters should furnish the plaintiffs with reports of such cases as they thought desirable for publication in *The Jurist*, upon the terms of being paid so much per printed sheet. There was no reservation by them of any right to publish the cases themselves, or of any copyright in such cases; nor was it expressed between the parties that the copyright should belong to the plaintiffs. In fact, nothing passed between the parties upon the subject. The reports, however, have always been made exclusively for *The Jurist*, under the employment before mentioned, and have always been inserted without alteration. All the cases the piracy of which *475] is complained of were duly paid for according to the terms of the employment.” It is clear there has been no compliance with the provisions of the 18th section, and therefore the copyright remains in the authors. The fact of the work having been registered by the plaintiffs clearly makes no difference. In *Brown v. Cooke*, 16 *Law Journ.*, N. S., Chan. 140, an injunction to restrain the sale of a periodical containing articles copied from the plaintiffs’ *London Medical Gazette*, was refused, on the ground that the plaintiffs had failed to make out their derivative title to the copyright under s. 18, by showing that the articles had been paid for. Here, it appears, the reports in question have been actually paid for: but *Brown v. Cooke* shows that *payment* is a condition precedent to the vesting of the copyright; and *Richardson v. Gilbert*, 1 *Simons*, N. S. 336, shows that a *contract for payment* is not sufficient. So, by the same reasoning, it must be shown that the reports were composed expressly on the terms that the copyright therein should belong to the employers and not to the authors. [MAULE, J.—You contend that the author, in the absence of an express agreement to the contrary, retains the right of separate publication; so that, although he has been paid for his labour, he may afterwards sell the copyright to another?] Precisely so. Moore did not lose his copyright by the publication of his poetical pieces in the *Reviews*.(a)

(a) *Quære*, the “Odes,” which were published in *The Times*, and afterwards in a collected form, with other works of the same author, by Messrs. Longmans, in 1828?

The publisher of the Review got all he bargained for, when he first gave them to the world. [MAULE, J.—What do you understand by a man being *employed* to write for another?] In *Brown v. Cooke*, the Vice-Chancellor (Shadwell) observes, “The words are ‘shall have been or shall hereafter be composed on the terms,’ that is, that the publisher shall *have employed the person to compose on the terms that [476 the copyright therein shall belong to such proprietor or publisher, and be paid for by such proprietor,—the copyright then shall belong to the publisher who has employed the person to make the articles, and has paid him for them upon the terms that the copyright shall belong to the publisher.” Upon this he is interrupted by Mr. Bethell, with a remark that “that construction would have this effect, that, if I sent to the Quarterly an article written by me, which is paid for, it would confer no copyright; because, according to the language of the act, there has been no antecedent employment of me.” The Vice-Chancellor proceeds: “I am not observing upon that, because I conceive that the payment is evidence of a thing at least tantamount to the employment. I am not putting it in that way.” Upon this, Mr. Rolt says: “I wished to call the attention of the court to some celebrated articles of Mr. Macaulay’s, which are now published in separate volumes, every one of which was written and paid for, and they all appeared in the *Edinburgh Review*.” The Vice-Chancellor continues: “I am now assuming what has been in my mind all along, that the meaning of the act of parliament, as I understand the language of it, is this, that, if the publisher of a periodical work employs a person to write articles for him, and pays him for them *upon the terms that the copyright shall be the proprietor’s*,—that is, the proprietor of a periodical work,—the proprietor shall have the copyright of the periodical work containing all the articles, with certain subsequent limitations, upon which nothing turns as far as this case is concerned.” If I employ another, without more, to write articles for me at so much per sheet;—is that such an “employment” as is provided for by the 18th section, and as will give me the proprietorship of the copyright? or does it only give me a license to publish the articles in my work? * [MAULE, J.—The question is, whether the nature of the employ- [477 ment in this case does not afford ground for us to infer that the reports were furnished upon the terms that the proprietors of *The Jurist* should have the copyright.] The case finds that nothing passed between the parties on the subject. It was for the plaintiffs to make out that the conditions, upon which alone the copyright could be theirs, have been complied with. They are not to have the copyright, unless the articles are composed on the terms that the copyright therein shall belong to the proprietors of the periodical. [MAULE, J.—There are no negative words.] The right is expressly given to the *author* by s. 3; and it is not taken away by s. 18, unless the conditions therein have

been complied with. [CROWDER, J.—Is it not to be inferred from the statement, that those conditions have been complied with?] Nothing being said, the court cannot infer that the employment imports that the copyright should be in the plaintiffs. In *The Bishop of Hereford v. Griffin*, 16 Simons, 190,—where it was held, that the proprietor of an encyclopædia, who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form, or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes,—the Vice-Chancellor says: "According to law, the copyright was in the plaintiff, except so far as he parted with it; therefore, no reservation was necessary to constitute a right in him." Upon the facts here stated, would a court of equity enforce an assignment of the copyright to the plaintiffs? It is submitted, therefore, upon the plain reading of the statute, and the fair construction of the facts in the special case, the copyright in the reports in question is not in the plaintiffs.

*478] *2. Assuming that the plaintiffs *are* the proprietors of the copyright, the next question is, whether the defendants have been guilty of piracy. It is not denied that a man may be guilty of piracy, though he take only a portion of a work. The question is in truth one of fact, whether the use made of another man's work is fair and reasonable, or the reverse. The question now for the first time arises in the case of a Digest, though works of that description have long been familiar to the profession. In the case of an encyclopædia, one can very well understand the appropriation of an article from the work of another may amount to piracy. So, where a man unduly avails himself of the labours of another under colour of an abridgment, as in *Butterworth v. Robinson*, 5 Ves. 709. In *Sweet v. Maugham*, 11 Simons, 51, the entire report was copied. It was not suggested in *Saunders v. Smith*, 3 Mylne & Cr. 711, that the mere taking of the side or marginal notes would constitute a piracy. In *D'Almaine v. Boosey*, 1 Y. & C. 288, 296,† Lord Lyndhurst speaks of Digests and Abridgments as being something very different from the works from which they are taken, and as being an allowable use of the productions of another. [JERVIS, C. J.—Lord Lyndhurst is there speaking of Viner's Abridgment and Comyns's Digest: but it is an abuse of terms to call this thing a Digest.] In *Dodsley v. Kinnersley*, Ambler, 403, also, it was held that a fair abridgment is not piracy. [MAULE, J.—You cannot justify the piratical use of another man's book, by merely calling the result an abridgment or a digest.] If this is piracy, the reporter who in reporting this case inserts the marginal note of a case which is read in the course of argument, is equally guilty of piracy. [CRESSWELL, J.—That is a totally different matter.] In all these cases, regard must be had to the general convenience of mankind. In *Sayre*

v. Moore, 1 East, 861 n., Lord *Mansfield says, "whoever has it in his intention to publish a chart, may take advantage of all prior publications." *Cary v. Kearsley*, 4 Esp. N. P. C. 168, is to the same effect. In all these cases, the question is, whether a fair and reasonable use has been made of an author's work, or whether it is a mere colourable copy: *Murray v. Bogue*, 1 Drewry, 853. If there is any mental labour, any literary skill, brought to bear upon the new work, the court will not stop to consider whether it is of the highest order of intellectual skill or not.

Lush, in reply, was desired to confine himself to the second question. If the defendants have printed for sale any portion of that in which the plaintiffs have copyright, they are guilty of an infringement of the statute, which evidently was intended to confer upon authors a larger amount of protection than they enjoyed before. Here are two reports, according to the statement of the case,—a long and a short one: if the defendants may copy one, why not the other? and, if either, why not both? No man has a right to copy parts of my book, and sell them for his own profit. Is it any excuse that he varies the order in which the matter is published? or that he robs others as well as me? *Butterworth v. Robinson*, 5 Ves. 709, is very like this case. [JERVIS, C. J.—It certainly is a very strong case. CRESSWELL, J.—It is expressly in point.] There is not a case, nor a dictum, in support of the defendants' argument, except the dictum of Lord Lyndhurst in *D'Almaine v. Boosey*, and there his Lordship was referring to Viner and to Comyns, which are in no respect similar to the defendants' work.

JERVIS, C. J.—As at present advised, but without pledging ourselves on the subject, we are all inclined to think that the plaintiffs had a property in the reports in *question. As to the question of piracy, [*480 however, we should like to have a little time to consider of it.

Cur. adv. vult.

JERVIS, C. J.—This case was argued before us in the course of the present term, and upon one of the points the court required a little time for deliberation. We now proceed to deliver our opinions, in which I regret to say there is not perfect unanimity.

Two questions were presented for our consideration,—first, whether the plaintiffs had a property in the copy of the reports in *The Jurist*, or of the head or side notes thereof, or in both, within the 5 & 6 Vict. c. 45, s. 18,—secondly, assuming that they had, whether the use made by the defendants of such head or side notes was such a piracy as to give the plaintiffs a cause of action against them.

1. At the close of the argument, we intimated an opinion that the plaintiffs had a copyright within the meaning of the 18th section, because it seemed to us,—and I believe we all remain of the same opinion,—that, where the proprietors of a periodical employ a gentleman to write a given article, or a series of articles or reports, expressly for

the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical, and paid for by the proprietors and publishers thereof, shall be the property of such proprietors and publishers; otherwise, it might be that the author might the day after his article has been published by the persons for whom he contracted to write it, re-publish it in a separate form, or in another serial, and there would be no correspondent benefit to the original publishers for the payment they had made. For these reasons, I think, and my learned Brothers all concur with me, that, under the *481] circumstances stated in this case, there is an implied condition, understanding, or arrangement between the proprietors of *The Jurist*, and the gentlemen who furnish them with reports or other articles for publication therein, that the former shall acquire a copyright in the articles so written for and published and paid for by them.

2. The question of piracy is one of more difficulty, and one, as I before observed, upon which we are not quite agreed. Upon the best consideration I am able to give the case, it appears to me that the facts stated disclose a case of piracy, so as to entitle the plaintiffs to maintain this action. It is undoubtedly exceedingly difficult, perhaps absolutely impossible, to lay down any general rule upon this subject. I do not assent to the argument urged by Mr. *Lush*, that every publication of a portion of a work in which there is subsisting copyright, will afford a ground of action: it is a question of degree, which must depend upon the circumstances of each particular case. But I think the defendants in this case have been guilty of an abuse of the fair right of extract which the law allows for the purpose of comment, criticism, or illustration; and that this is in reality an unauthorized publication of a portion of the plaintiffs' work, without justifiable excuse. The plaintiffs' publication, *The Jurist*, or that portion of it from which these extracts are made, consists of double reports in each case,—a detailed report of the facts of the case, with the arguments, and the judgment of the court,—and an abstract, in the shape of what is commonly called a side or marginal note, which professes to state the principle of law laid down in the case, if any such there be, or a summary statement of the facts and the decision of the court thereon. In truth they are two reports, a short and a long one. The gentleman who has compiled *The Monthly Digest*, has, as the case states, taken the short report verbatim. If the *482] law allows him to do that, why should he not also be allowed to take the fuller report? And, if he might take either the one or the other, why should he not take both? The question is, whether a man can acquire a right to avail himself in this way of the labours of another, merely because he arranges the matter under heads and subdivisions, so as to form with other matter of the same sort, derived from other sources, what is called an analytical digest. I am of opinion that he cannot. A digest undoubtedly may be made from the published

reports, without necessarily subjecting the compiler to a charge of piracy: for instance, where the party applies the exertion and skill of his own brain in extracting the principle or the substance of the decisions before him, dressing it up in his own language, so as to produce an original work. But here, there is no thought or skill brought to bear upon the work that is complained of; it is a mere mechanical stringing together of marginal or side notes which the labour and intelligence of the authors have fashioned ready to the compiler's hand. In my mind, the case of *Butterworth v. Robinson*, 5 Ves. 709, is precisely in point. There, the defendant reprinted the facts and the judgments, copying them from the plaintiffs' work, and arranging them alphabetically under appropriate heads: and it was held, that the mere fact of their being so analytically arranged did not constitute the piratical publication a new work, so as to protect its author and publisher from the consequences of his unauthorized invasion of the plaintiffs' copyright: and accordingly the injunction prayed for was granted.

Upon these grounds, I am of opinion that the plaintiffs are entitled to the judgment of the court upon both points, and that the verdict ought to stand.

MAULE, J.—1. As to the first question,—whether these plaintiffs had a property in the reports in *The Jurist*, as being the proprietors of the publication for the purposes of which they were expressly composed,—I concur with my Lord, and I believe with my two learned Brothers also, in thinking that they are within the provisions of the 18th section of the 5 & 6 Vict. c. 45, which says, that, “when any publisher or other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of, any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act; except only, that, in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works

of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given *484] by this act: Provided always, that, during the term of *twenty-eight years, the said proprietor, projector, publisher, or conductor, shall not publish any such essay, article, or portion separately or singly, without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid, to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right, shall be entitled to the copyright in such composition when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector, publisher, or conductor, as aforesaid." It was urged that these reports were not written "on the terms that the copyright therein should belong to the proprietors" of *The Jurist*, because there were no express words in the contract under which they were written, conferring upon them the right to the copy. But, though no express words to that effect are stated in this special case, I think, that, where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer,—subject, of course, to the limitation pointed out in the 18th section of the act. I therefore think there is nothing to prevent the plaintiffs, who are the proprietors of *The Jurist*, from maintaining an action for the infringement of their copyright in the reports in question.

*485] 2. As to the actual piracy, I do not so clearly concur *in the opinion which has been expressed by the Lord Chief Justice, and in what I understand to be the opinions of my Brothers Cresswell and Crowder. It is not surprising that there should be a difference of opinion upon such a subject, seeing that it is not so much a question of kind as of degree. It is difficult to draw the line, where the question is whether the use that is made of a work is fair and reasonable, or is substantially what is unlawful and forbidden, and only colourably and evasively different from it. In the present case, the inclination of my opinion is, that the work of the defendants is a different work, having a different object in view, and being totally different in its result, from the work published by the plaintiffs. It may be that some persons may dispense with the plaintiffs' work, and take the defendants', though a very imperfect substitute for it; though I should very much doubt

whether it would enable any person who really wanted it to dispense with the plaintiffs' publication. The object of a digest, is, to afford facilities for finding out cases that are inserted in the reports, without buying the reports themselves in extenso. The effect may be to induce many persons to abstain from purchasing the reports, relying upon the means of access to public libraries and other institutions for the fuller and more perfect information when they have occasion for it. But that, I think, is no argument in favour of this being a piracy: rather the contrary, because it shows that the defendants' work is useful only for a different purpose from that of the plaintiffs, and is not, and never was intended as, a substitute for it. The Lord Chief Justice seems to have been struck with the argument that here are in truth two reports,—a short one and a more circumstantial and extended one. I do not conceive that to be true. It may sometimes be that the marginal note as it is called, is but an epitome of the *circumstances and the ruling [*486 contained in the report itself: these, however, are not the best or most useful marginal notes, but something which the reporter has recourse to when he finds it impracticable to do that which is the more proper and legitimate office of the marginal note,—simply to state the principle of law which is laid down or supported by the case in hand: for instance, you may find a marginal note to this effect, "No addition of the deponent is necessary in an affidavit made by a party to the suit." Again, "Declarations made by a party to a deed, as to its contents, are not admissible in evidence to cut down his title;" or "Damage resulting from the ship's taking the ground on the falling of the tide, in a tide-harbour, in a spot where she is properly placed for the purpose of unloading, is not a stranding within the ordinary terms of a policy of insurance;" or "A devise of 'all my estate and effects, both real and personal, which I shall die possessed of,' extends to lands acquired by the testator after the date of his will." That is the legitimate and the best style of a marginal note; it contains no statement of the facts of the case; in no sense is it, or does it profess to be, a second report. That in my opinion disposes of the argument, such as it is, of these being double reports: and I think no conclusion unfavourable to the defendants can fairly and legitimately be drawn from that suggestion. The marginal notes do not profess to be condensed reports of the principal case: they only degenerate into abridgments, when the reporter, from inability to state the precise principle of law which is to be deduced from the decision, has recourse to the clumsy expedient,—sometimes, no doubt, unavoidable,—of shortly restating the facts of the case. In that case, it may be said that they constitute two reports. It is true that the very words of the marginal notes of *The Jurist* and of other reports have been taken by the defendants and inserted in their *Monthly Digest*. *But it is agreed that it is not every verbatim extract [*487 that constitutes a piracy: that must depend upon the length of

the extract, the purpose for which it is made, and other circumstances. It is not contended on the part of the plaintiffs that the mere quantity of the matter copied from their work constitutes the piracy. And, for anything that appears, the plaintiffs are the only persons who complain. There is nothing wrong, therefore, as against the plaintiffs, in nineteenth-twentieths of the defendants' publication. The defendants have devised, or rather adopted, a scheme of putting together short notes of the decisions of the various courts, published within a given space of time, distributing them in such a form of arrangement and classification as to make them more readily accessible to those who are seeking to be informed of the most recently promulgated law upon any given subject. By far the larger part of the matter so distributed,—about the proportion I before mentioned,—is, as against the plaintiffs, the defendants' own property; and the method of arrangement is entirely his own. That being the state of things, the defendants have, as it seems to me, made and published a book altogether different from the plaintiffs' work, intending to answer and really effecting a totally different purpose. Therefore I conceive that they have not in a sense that is unlawful copied any part of the plaintiffs' work; but that they have done nothing more than is done, and lawfully done, by one who, for the purpose of supporting and fortifying his own argument, avails himself of the work of another to the extent to which it is made *publici juris* for the purpose of being read and extracted from to a fair and *bonâ fide* and legitimate extent. This, as it appears to me, is the true view of the matter; though I express my opinion upon it with that degree of hesitation and doubt which I cannot but feel when I find that my Lord and my two *488] learned *Brothers have arrived at a different conclusion. This difference of opinion, however, is not of sufficient importance to induce me to desire further time for deliberation, which otherwise I should have been glad to have had, in order that, in the opinion I have thus imperfectly expressed, I might have more fully and more clearly assigned my reasons for the conclusion to which I have felt myself irresistibly drawn. Of all cases, this is one in which it is obviously more difficult than any other to draw the line.

CRESSWELL, J.—1. As to the first point, I do not think it necessary to add anything to what has fallen from my Lord and my Brother Maule. Under the circumstances stated in the special case, the copyright in the reports in question clearly vested in the plaintiffs as the proprietors of the work for which they were prepared.

2. As to the second point, I quite agree with my Brother Maule, that it is very difficult to draw the line between that which is a fair and legitimate use of an author's work for the purpose of extract, or comment, or illustration, and that which amounts to piracy. But it occurs to me that the defendants in this case have overstepped that line. The

portions of the plaintiffs' publication which the defendants have copied, were not taken for the purpose of comment or illustration, but simply for the purpose of making them the subject of sale for their own intrinsic value, though the work in which they appear is composed of other matter in addition culled from other sources. I am clearly of opinion that that is an unauthorized and piratical use of the plaintiffs' work, and that the plaintiffs are entitled to judgment.

CROWDER, J.—I have arrived at the same opinion as my Lord and my Brother Cresswell after much *difficulty and doubt. In the course of the argument, I must confess my mind has undergone [*489 considerable fluctuation as to both points. Looking, however, to the language of the 18th section of the 5 & 6 Vict. c. 45, which enacts, that, "when any publisher or other person shall, before or at the time of the passing of the act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of, any encyclopædia, review, magazine, periodical work, &c., and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, articles, &c., shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, &c., and paid for by such proprietor, &c., the copyright in such encyclopædia, &c., so composed and paid for shall be the property of such proprietor, &c., who shall enjoy the same rights as if he were the actual author thereof," &c.,—and looking at the facts stated in this special case, which show that there was a verbal arrangement between the proprietors of *The Jurist* and the gentlemen who furnished these reports, that they should be furnished by them for publication in *The Jurist* at an agreed price, without any reservation of copyright in the authors,—it seems to me that it was not necessary that there should be any express stipulation as to the terms upon which the reports were to be composed, in order to confer the copyright upon the plaintiffs; but that the terms might be inferred from the general nature and character of the employment; and that, sitting as we do, with power to draw such inferences as a jury might draw, we may reasonably arrive at the conclusion that the understanding between the authors of those reports and the proprietors of the work in which they were *published, was, [*490 that the latter should have the copyright therein.

2. Upon the second point I have entertained considerably more doubt; and though, after much anxious reflection, I have come to the same conclusion that the Lord Chief Justice and my Brother Cresswell have arrived at, it is not without great hesitation, more especially as my Brother Maule has expressed a contrary opinion. The difficulty I have felt as to this point, is, that the work which the defendants have pub-

lished had not the same object in view as that published by the plaintiffs; nor was there any intention on the part of the defendants in any degree to interfere with the sale of the plaintiffs' publication; their work being intended to effect a totally different result. Under such circumstances, one might very reasonably entertain doubt whether the use the defendants have made of the plaintiffs' work could amount to piracy. Looking, however, at the language of the statute, I feel very reluctantly bound to express my opinion that it may and does amount to piracy. It falls exactly within the 15th section, taken in connexion with the interpretation clause, s. 2. The result of those two sections is this,—that a person is guilty of piracy, who prints or causes to be printed for sale any book or part of a book in which there is subsisting copyright, without the consent in writing of the author or proprietor. That which the defendants have printed and published without the sanction of the plaintiffs, is undoubtedly a part, and a very considerable and important part, of the work of the plaintiffs. With respect to the argument which was urged by Mr. *Lush*, and adopted by my Lord Chief Justice and my Brother Cresswell, viz. that the plaintiffs' work consists of two reports, the one a full and the other an abridged one, and that the defendants could have no more right to copy the one than the other *491] or *both of them,—it seems to me that there is much weight in the observations of my Brother Maule upon that subject; and it does not strike me that it affords any very safe ground of argument against the defendants. The head-note, or the side or marginal note of a report is a thing upon which much skill and exercise of thought is required, to express in clear and concise language the principle of law to be deduced from the decision to which it is prefixed, or the facts and circumstances which bring the case in hand within some principle or rule of law or of practice. The question, according to my notion, is, whether that is not something substantial in which the law gives the author or proprietor a copyright. It seems to me, that, although the object of the defendants was simply to put together after a manner of their own, and for a purpose quite different from that for which the plaintiffs published their work, these marginal notes, with others derived from other similar sources, nevertheless they do avail themselves, to an extent which the law does not warrant, of the labour and skill and capital of the plaintiffs, and have appropriated to their own use that which is substantially the property of the plaintiffs, and a property of a description which the statute intended to secure to them. I have, therefore, though with great reluctance and difficulty, come to the conclusion, that, however useful and meritorious the defendants' work may be, they were not justified in making the use they did of the plaintiffs' work, but were guilty of piracy within the meaning of this act of parliament.

The judgment of the court, therefore, will be for the plaintiffs.

Judgment for the plaintiffs.

A reporter has a copyright in his marginal notes, and in the arguments of counsel as prepared and arranged in his work: *Gray v. Russell*, 1 Story, 11. An abridgment, in which there is a substantial condensation of the materials of the original work, and which requires intellectual labour and judgment, does not constitute a piracy of copyright; but an abridgment, consisting of extracts of the essential or most valuable portions of the original work, is a piracy: *Folsom v. Marsh*, 2 Story, 100. "We must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work:" Story, J. A new and original plan, arrangement, or combination of materials will entitle the author to a copyright therein, whether the materials themselves be new or old: *Emerson v. Davies*, 3 Story, 768; *Webb v. Powers*, 2 Woodbury & Minot, 497; *Story's Executors v. Holcombe*, 4 M'Lean, 806.

*BARRICK and Others v. BUBA and Another. June 7. [*492

A commission will not be granted for the examination of witnesses in a hostile country.

THIS was an action for the breach of a charter-party entered into by the defendants, who were Russian subjects residing the one at Moscow the other at Odessa, for the conveyance of a cargo of produce from Odessa to the united kingdom.

On the 13th of February last, a summons was taken out on behalf of the defendants, requiring the plaintiffs to show cause why a commission should not issue to examine upon interrogatories Stephen Buba (one of the defendants), George Kelner, and other witnesses on behalf of the defendants, at Odessa, in the empire of Russia. This summons was attended before Jervis, C. J., who, after an abortive attempt to bring the parties to terms, directed the summons to stand over, to give the defendants an opportunity of applying to the court.

Bovill, accordingly in Easter Term last, moved for a rule calling upon the plaintiffs to show cause why a commission should not issue for the examination of the witnesses, or why the proceedings should not be stayed for six months. The affidavit upon which he moved stated that there existed ample means of communication with Odessa, notwithstanding the war between this country and Russia, and that there were many British residents there to whom the commission might be addressed. [CRESWELL, J.—Is there any instance of a commission having issued to examine witnesses in an enemy's country pending hostilities?] No. But an alien enemy, though the courts of this country will not aid him.

in initiating proceedings, is not left wholly at the mercy of one who
 *493] sues him. The court will, for *instance, prevent his being at-
 tached; and he may file a bill of discovery. A stay of the pro-
 ceedings would probably induce the plaintiffs to make admissions.

A rule nisi having been granted,

Lush now showed cause, submitting that the court had no power to
 issue a commission for the examination in a hostile country of parties
 who were subjects of the state with which this country is in a state of
 actual warfare.

Bovill, in support of his rule.—If the witnesses are willing to be
 examined, the fact of our being at war with the country of which they
 are subjects, and in which they reside, can make no difference as to the
 power of the court to order the commission to go. [JERVIS, C. J.—
 You are in effect asking us to direct certain of the Queen's subjects
 to hold communication with the Queen's enemies,—unless, indeed, by
 living under the protection of the emperor of Russia, they have aban-
 doned their allegiance to the crown of England, which might raise
 another difficulty: *Albrectht v. Sussman*, 2 Ves. & B. 323.] It may
 be that the court would not afford any facilities to an alien enemy to
 enforce any rights in this country: but, being brought into court, they
 will not deny him the opportunity of setting up a lawful defence.
 [CRESSWELL, J.—Do you find any precedent for such an application?] It
 must be acknowledged that there is none to be found: but it is
 submitted that there is no rule or principle of law that is opposed
 to it.

JERVIS, C. J.—I am of opinion that the commission prayed ought
 not to be granted. It is enough to say that we have no precedent for
 it. Independently, however, of that, I see many objections to it.

*494] *MAULE, J.—Apart from the objection that the plaintiffs would
 not stand in so favourable a position as the defendants on the
 proposed examination, I think, if we were to grant a commission, we
 should be sanctioning an unlawful communication with the Queen's
 enemies.

CRESSWELL, J.—I am of the same opinion. That which we are
 asked to do, seems never to have been attempted before. The thing
 seems to me perfectly impracticable, apart from any other ground of
 objection.

CROWDER, J., concurred.

Rule discharged.

WOOD v. COX. June 2.

Practice as to allowing affidavits in answer to "new matter," upon motions, under 17 & 18 Vict. c. 125, s. 45.

THIS was an action upon a promissory note for 10*l.* made by the defendant to the order of one F. J. Keene, payable on demand.

The defendant pleaded that Keene did not endorse the note; and that he was induced to make it by the fraud and covin of Keene, and the plaintiff took it after it became due, and without consideration, and with knowledge of the fraud, and that he was suing upon it for the benefit of Keene.

At the trial before the under-sheriff of Middlesex, the jury found a verdict for the defendant, and, in Easter Term last,

F. Russell obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was not warranted by the evidence. The misdirection *complained of, was, that there was no evidence whatever to leave to the jury in support of either of the [*495 pleas.

An affidavit having been used on the motion in order to show how the under-sheriff had left the case to the jury, and *Prentice*, who was to show cause, having handed to *Russell* an affidavit which he proposed to read in answer, detailing the transaction out of which the action arose,^(a)

Russell, on a former day in this term, applied for leave to file an affidavit in answer, under the 45th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts, that, "upon motions founded upon affidavits, it shall be lawful for either party, with leave of the court or a judge, to make affidavits in answer to the affidavits of the opposite party, upon any new matter arising out of such affidavits, subject to all such rules as shall hereafter be made respecting such affidavits." [MAULE, J.—The 45th section applies only to affidavits which are *used* by the opposite party. JERVIS, C. J.—There is nothing upon which to found a substantive motion. When the rule comes on for argument, it may be that we may think it right to give you an opportunity to answer any new matter in the affidavit on which cause is shown. By showing you his affidavit, according to the ordinary courtesy of the bar, Mr. *Prentice* does not bind himself to produce it. *Lush*, Amicus Curie, stated, that, in the Court of Queen's Bench, the usual course was, to move for leave to file affidavits in answer, before the rule came on. JERVIS, C. J.—I cannot help thinking that the matter has not been well considered. The effect would be very much to aggravate the expense of a rule, when it might perhaps turn out to be wholly unnecessary. It must be a rule nisi, *and affidavits [*496 must be filed, and office copies taken. What has been the prac-

(a) See *Lilley v. Johnson*, 2 M. & W. 386,† 5 Dowl. P. C. 608.

tice of the Court of Exchequer upon the subject? *Lush* said he was not aware that the question had yet been raised there. MAULE, J.—You have no *right* to see your opponent's affidavits: and you cannot show them to your client. If the practice of handing over affidavits is to lead to such a consequence as this,—to involve the client in the costs of another motion,—no counsel in future will, or ought to, show his affidavits to his opponent before the rule comes on.]

JERVIS, C. J.—The practice, it seems, is not yet settled in the Exchequer. The Court of Queen's Bench have decided that advantage is to be taken of the 45th section of the 17 & 18 Vict. c. 125, by a substantive motion. For the reasons already given, we are not inclined to adopt that construction of the act. If, therefore, we decide the other way, the Court of Exchequer, when the question arises before them, may settle the practice, which it is very desirable should be done at once.

Cause was afterwards shown against the rule; and the court, without requiring any additional affidavits, made the rule absolute for a new trial.
Rule accordingly.

*497]

*HARVEY v. DIVERS. May 30.

Except under special circumstances, the expenses of the attendance of witnesses on the commission day at the assizes cannot be allowed.

THIS was an action brought to recover the value of certain goods supplied for the use of a mine. The venue was laid in Cornwall. The commission day at Bodmin was, the 22d of March. On the 20th, the cause was settled, in London, by the defendant's consenting to a judge's order for the payment of the debt and costs, "as between attorney and client," by instalments. The order was drawn up at four o'clock in the afternoon of the 20th of March, and was sent by post that evening. Notice was immediately on the receipt of the order sent to prevent the plaintiff's witnesses,—eleven in number, and who resided at Heyl and Camborne, about forty-four miles from Bodmin, and twenty from Truro,—being brought to Bodmin; but, before the notice arrived, the plaintiff's attorney in the country had procured a conveyance^(a) and started the witnesses, who arrived at Bodmin in the evening of the 21st, whence they returned home on the following day. Upon the taxation of costs under the judge's order, the master disallowed the plaintiff the expenses of the witnesses, on the ground that their attendance at the assizes before the commission day was unnecessary.

Maynard moved for a rule calling upon the defendant to show cause why the master should not be at liberty to review his taxation.—A

(a) An omnibus and a pair of horses; there being no railway beyond Truro that could be made available.

plaintiff is bound to have his witnesses in attendance from the commencement of the assizes, and is entitled to the costs of their attendance previous to the day of trial: *Cosgrave v. Evans*, 2 Dowl. [*498

*P. C. 448. Whether or not the whole time of their attendance is to be allowed, must, no doubt, depend upon circumstances, upon which the master must exercise his discretion: *Thomas v. Saunders*, 3 N. & M. 572; *Platt v. Greene*, 2 Dowl. P. C. 216. [CROWDER, J.—The question is, whether it was necessary that the witnesses should be at Bodmin before the afternoon of the commission day.] Though not very usual, it is not at all impossible that the judge may commence the actual business of the assizes on the commission day: it was, therefore, not an unreasonable precaution on the part of the attorney to have the witnesses ready the day before. [MAULE, J.—Having to come forty-four miles in a part of the country where there is no complete railway communication, if the witnesses had been started at nine o'clock in the morning of the 22d,—which is early enough to be called upon to commence a journey,—it is possible that they might have arrived too late at Bodmin. JERVIS, C. J.—It is not by any means usual to take causes on the commission day. CROWDER, J.—I have had some years' experience on the Western Circuit, and I can certify that causes have *never* been tried at Bodmin on the commission day.] The question is, whether the attorney has committed any impropriety, or done more than the exercise of a fair precaution required of him, in having his witnesses ready for the 21st. [CRESSWELL, J.—The difficulty might have been obviated by specially providing for it in the order.] The provision for the taxation of the costs "as between attorney and client,"—which, according to the view of Wightman, J., in *Lipscombe v. Turner*, 4 D. & L. 125, means, "that they shall be so taxed as that the other party shall have no costs to pay,"—ought to be enough to relieve the plaintiff from the difficulty, if any there be. [CRESSWELL, J.—The order deals only with costs "as between attorney and client" *up to that time.*]

**Garth*, who showed cause in the first instance, submitted that the matter was one purely for the discretion of the master, and [*499 that the court would not, in the absence of special circumstances, inquire whether or not his discretion had been properly exercised.

Master *Park* stated that the general practice was, not to allow the expenses of the attendance of witnesses at the assizes on the commission day; and that to allow them would be adding enormously, and in most cases uselessly, to the costs of a cause.

JERVIS, C. J.—The master certifies to us that the practice is universal, not to allow the costs of the attendance of witnesses at the assizes on the commission day. And he further tells us that he has consulted the masters of the Court of Queen's Bench, and that they concur in that view. We cannot, therefore, grant a rule in this case. If there

had been special circumstances to warrant it, and the master had allowed these costs, we should not probably have interfered. But no special circumstances were shown before the master, and none are suggested now. This is a matter which might have been provided for by the judge's order.

The rest of the court concurring,

Rule refused.

Garth asked for the costs of the motion.

Per Curiam.—Costs are never given where cause is shown in the first instance, and the rule is refused.

*500] ***LOWE v. GEORGE PESKETT and CHARLES PESKETT,**
Executors of **RICHARD PESKETT, Deceased.** *May 28.*

Testator devised a freehold house to his son A. (whom he appointed one of his executors), charged with a sum of money, payable within twelve months after his death, to be applied in payment of debts and legacies:—Held, *equitable* assets in the hands of the executors, though not available for distribution till the expiration of the twelve months.

A. made a promissory note, payable *on demand*, to his son B., and by his will devised to B. a freehold house, charged with 240*l.*, to be raised within a year after his death, and paid to his executors for the liquidation of debts and legacies; and he made B. and C. (another son) his executors. The two executors proved the will, and B. took possession of the house, and afterwards endorsed the note to D., who sued the executors thereon. To this action B. pleaded *plenè administravit*; and C. pleaded (amongst other pleas, not including *plenè administravit*), that the note was made payable to B. on demand, and that it was endorsed by B. to D. after the death of the testator, and that B. at the time of such endorsement had assets of the testator in his hands, whereby the note was satisfied. The only assets that ever came to the hands of B. consisted of the 240*l.* charged upon the house devised to him:—

Held, that the plea was not proved; for, that the allegation that B. had assets of the testator in his hands at the time of the endorsement of the note, was a material allegation, and meant *legal* assets presently available; and the 240*l.* was not *legal*, but *equitable* assets, and not available as assets until the expiration of the year.

THIS was an action against the defendants as executors of Richard Peskett, their deceased father, upon a promissory note for 97*l.* 10*s.*, drawn by the testator in his lifetime, payable, on demand, to Charles Peskett, and endorsed by Charles Peskett, to the plaintiff.

The defendant Charles Peskett pleaded, *plenè administravit*.

The other defendant, George Peskett, pleaded, fourthly, that the note was made by the testator payable to Charles Peskett, and was endorsed by Charles to the plaintiff after the testator's death, and that Charles had assets of the testator in his hands before the endorsement by him to the plaintiff, whereby the debt was extinguished. Issue thereon.

The cause was tried before Maule, J., at the first sitting in London, in Easter term last. The facts which appeared in evidence were as follows:—Richard Peskett, the testator, by his will, devised to his son Charles a freehold house, charged with the payment of a sum of 240*l.* within twelve months after his, the testator's decease, to be applied by his executors in *satisfaction of debts and legacies; and he ap-
*501] pointed his two sons, George and Charles, his executors, by whom

the will was duly proved. Charles Peskett took possession of the house; but there was no proof that any part of the 240*l.* had been paid by him. The promissory note, which was assumed to have been given for value, was endorsed by Charles Peskett to the plaintiff after the testator's death.

On the part of the defendant George Peskett,—it was insisted that the 240*l.* charged upon the house devised to the testator's son Charles, was assets in the hands of the executors, although the twelve months had not elapsed, and that, even if it were not so, the fact of Charles, the creditor, being appointed executor (and acting) operated as an extinguishment of the debt, and consequently that he, the defendant George Peskett, was entitled to a verdict on the fourth issue.

A verdict was found for the plaintiff, and leave was reserved to the defendant George Peskett to move to enter a verdict for him on the fourth issue, if the court should be of opinion that there was evidence which ought to have been left to the jury, in support of the fourth plea.

Collier, in Easter Term last, accordingly obtained a rule nisi to enter a verdict for the defendant George Peskett on the fourth issue, on the grounds,—first, that the learned judge ought to have directed the jury that there was evidence of the executor Charles Peskett having assets,—secondly, that the allegation of his having assets was surplusage, and that enough remained to constitute a defence, inasmuch as a man cannot sue himself, and, the cause of action being extinguished and at an end, it was not competent to Charles to transfer it to the plaintiff. He referred to *Williams on Executors*, 4th edit. p. 1129. [JERVIS, C. J.—The charge of the 240*l.* on the property *devised to Charles had not attached at the time of the endorsement of the note.] No. [*502 But Charles had the value of the 240*l.*; he had taken possession of the house. [JERVIS, C. J.—If there had been nothing in the will postponing the time for payment of the 240*l.*, no doubt it would have been assets in the hands of the executors immediately upon Charles's entering. But, as the matter stands, the question is whether it becomes assets till the end of the twelve months.] It is submitted that it would be assets in the hands of Charles from the moment of the testator's death. Having taken possession of the subject of the devise, the debt upon the promissory note was in law extinguished. [WILLIAMS, J.—Suppose, instead of a promissory note, it had been a bond, of which Charles was the obligee, could he immediately after the death of the testator have sued the heir?] In that case, the same person would not have been both plaintiff and defendant. [JERVIS, C. J.—You must say he could not, because he had the money's worth in his hands at the time.] Rejecting as surplusage the allegation in the plea that Charles had assets in his hands at the time of the endorsement of the note to the plaintiff, enough remains to make the plea a good defence. The cause of action was at an end, and could not be transferred.

Lush and *J. Brown* now showed cause.—The rule was moved upon two grounds,—first, that there was evidence of the executor Charles Peskett having assets,—secondly, that the allegation of his having assets might be rejected as immaterial, and that there was evidence to support the rest of the plea. The circumstance of a debtor making his creditor his executor, is no release or extinguishment of the debt, unless the creditor as executor has assets in his hands sufficient to pay it. The executor may in that case retain enough to pay himself,

*except as against creditors of a higher degree. The law is thus
*503] stated in *Williams on Executors*, 4th edit. p. 1129,—“There has already,—pp. 894 et seq.,—been occasion to consider the privilege enjoyed by a creditor, who is appointed to the office of executor, of retaining for his own debt out of the assets, in priority to all other creditors of equal degree. But it further remains to investigate how far that appointment and the consequent privilege operate as an extinguishment of the claim of the executor. If a debtor makes his creditor, or the executor of his creditor, his executor, this alone is no extinguishment of the debt, though there be the same hand to receive and pay: yet, if the executor has assets of the debtor, it is an extinguishment; because then it is within the rule that the person who is to receive the money, is the person who ought to pay it: but, if he has no assets, then he is not the person who ought to pay, though he is the person that is to receive it.(a) The debt, in other words, is not extinct, unless upon a supposition that the executor has assets, which he may retain to pay himself.(b) Therefore, if the obligor makes the obligee his executor, and he has no assets, he may sue the heir, if the heir be bound.(c) But it is said, that, if he pays himself any part of his debt by retaining out of the assets, he cannot sue the heir for the residue; for, he cannot apportion his debt, but he ought to retain goods for the whole, or have an action for the whole against the heir.(d) The law is the same if one

*of several joint and several debtors makes their common creditor his executor: therefore, if such an executor has assets, the debt is extinct, and he cannot sue the other debtor; for, the having assets amounts to payment.(e) Thus, in the case of *Locke v. Crosse*,(f) the obligee was made executor to one of two joint and several obligors, and, in an action by him against the other, where the matter was pleaded, the plea was held to be bad, because it did not show to what value the assets were that the plaintiff administered; but, if the defendant had shown that the plaintiff had administered goods to the value of

(a) *Woodward v. Lord Darcy*, Plowd. 185; *Fryer v. Gildridge*, Hob. 10; *Cock v. Crosse*, 2 Lev. 72, 3 Keb. 116, 1 Freem. 49, pl. 59; *Wankford v. Wankford*, 1 Salk. 305, per Holt, C. J.

(b) Per Powell, J., in *Wankford v. Wankford*, 1 Salk. 304.

(c) 1 Roll. Abr. 940, (M.) pl. 5; *Pidgeon v. Pitts*, 2 Show. 401, pl. 273; *Wankford v. Wankford*, 1 Salk. 304. by Powell, J.; Co. Litt. 264 b, note by Butler.

(d) *Woodward v. Lord Darcy*, Plowd. 185, 186; Went. Off. Ex. 78, 14th edit.

(e) *Wankford v. Wankford*, 1 Salk. 305, by Holt, C. J.

(f) Cited by Holt, C. J., 1 Salk. 305, S. C. nomine *Cock v. Crosse*, 2 Lev. 72, 3 Keb. 116, 1 Freem. 49, pl. 59.

the debt in demand, it had been a good plea. Again, the same doctrine prevails where the debtor appoints his creditor to be one of several executors, *if the creditor administers*. (a) But, if the creditor neither proves the will, nor acts as executor, he may bring an action against the other executor; (b) nor is it necessary, to enable him so to do, that he should renounce before the ordinary. (c) So, if the debtor makes the creditor and another his executors, and the creditor does not administer, but dies, his executor shall have an action against the surviving executor." (d) Whether or not, therefore, the appointment of the creditor as executor by the debtor, operates to extinguish the debt, depends upon whether or not the executor has assets in his hands which he is entitled to appropriate to the payment of his own debt. Now, unless the acceptance by Charles Peskett of the house devised to him with a charge of 240*l.* *upon it, to be paid at a future day, was [*505 assets, Charles Peskett had received no assets at the time of the endorsement of the note by him to the plaintiff. If the charge had actually been realized, it would only have been *equitable* assets, inasmuch as the executor would be bound to appropriate it in the manner specified in the will. A court of equity would have dealt with the money thus,—by paying the creditors, *pari passu*, *pro rata*, and then dividing the surplus between the two executors. In *Clay v. Willis*, 1 B. & C. 364 (E. C. L. R. vol. 8), 2 D. & R. 539 (E. C. L. R. vol. 16), A. mortgaged lands in fee to B. & Co., with a power of sale, upon trust to repay themselves the moneys advanced, &c., and to pay over the surplus to A., his executors and administrators. Before any sale was made, A. died, having devised all his real and personal property to C. and D. (whom he also made executors), upon trust to sell, and pay debts, &c. During the lifetime of C. and D., B. & Co. sold the estate, and paid the surplus into the hands of E., who was agent for C. and D. Whilst the money remained in E.'s hands, C. and D. died. E. also died soon after, leaving the defendant his executor. The plaintiffs having taken out administration *de bonis non*, with the will of A. annexed, brought an action for money had and received against the defendant: and it was held, that it could not be maintained, for that the money in the defendant's hands was equitable, and not legal assets, and therefore would not have been recoverable by C. and D., in their representative character. Suppose here the devise of the house had been to a third person, and he had paid the 240*l.* charged upon it to Charles Peskett, he could not have appropriated it to his own debt: it clearly would only have been equitable assets in his hands for distribution among all the creditors *pari passu*.

(a) *Woodward v. Lord Darcy*, Plowd. 184; *Dorchester v. Webb*, Cro. Car. 372.

(b) *Dorchester v. Webb*, Sir W. Jones, 345.

(c) *Rawlinson v. Shaw*, 3 T. R. 557.

(d) *Woodward v. Lord Darcy*, Plowd. 184.

*506] *Collier and John Gray*, in support of the rule.—There *was clear evidence of assets. The moment Charles Peskett took upon himself the office of executor, the debt upon the note was released and extinguished. Assuming the law upon this subject to be correctly laid down in *Williams on Executors*, p. 1129, there is no foundation for the distinction suggested on the other side between legal and equitable assets. The only difference between them is, that a creditor can only enforce his remedy at law out of the former, whereas the latter are distributed in the court of equity. But it is just as much the executor's duty to pay, or his right to retain, out of equitable as out of legal assets. In *Wentworth on Executors*, 14th edit. p. 177, the learned author says: "If a man by his will give lands in fee to his executors, to be sold for performance of his will, these (before the money thereby raised) are assets both for payment of debts and of legacies. But, if the lands had been given to be sold only for payment of debts, they should only be assets for that purpose, and not for payment of legacies: and so, if it were expressed to be for payment of legacies singularly, this should not be assets for debts, as I take it. For, since these are not assets of their own nature, but so made by the will and disposition of the testator, methinks they cannot be otherwise nor further assets than as the testator hath willed and disposed." [JERVIS, C. J.—Does *Wentworth* cite any authority for that?] No. It is said that this money was not assets, because the twelve months had not expired at the time the note was endorsed or the action brought. But the case of *Norden v. Levit*, 2 *Levinz*, 189, shows, that, in order to constitute assets, it is not necessary that the money should be presently payable. There, an executor, having an action of trover in right of the testator, compounded it by articles for payment of so much at a future day; and it was held that this was a conversion, and assets in his hands, *before*

*507] **payment*. [MAULE, J.—Does not "assets," in pleading, mean *legal assets*,—assets which the executor is bound to apply, on pain of losing his debt? JERVIS, C. J.—What assets are you held to exhaust on a plea of *plenè administravit*?] Legal assets, no doubt. In *Wankford v. Wankford*, 1 *Salk.* 299, an obligor was made executor to the obligee, and administered some of the goods, but did not prove the will, and died: it was held, that the debt was extinguished, and that the administrator cum testamento annexo could have no action for it. [JERVIS, C. J.—You say, that, inasmuch as Charles Peskett got the house, charged with 240*l.* payable within a year after the testator's decease, and there were no other creditors, the 240*l.* was assets.] Precisely so: there was no evidence of any other creditors. [MAULE, J.—Suppose another man owed 240*l.* to the estate, that clearly would not be assets until paid.] The moment the devisee accepted the devise, the charge upon it became assets in his hands; there was then *debitum in præsentì*. In *Williams on Executors*, 4th edit. 1422, it is said: "It

has been laid down, that, where an executor sues for money had and received to his use as executor, the debt or damages is assets immediately: for, if the money was had and received by the defendant, by the consent or appointment of the executor, it was assets in his hands forthwith; and, if without his consent, yet the bringing the action is such a consent, that, upon judgment obtained, it shall be assets immediately, without execution: *Jenkins v. Plume*, 1 Salk. 207, 6 Mod. 181."(a) In Com. Dig. *Administration* (B. 5), it is "laid down, [*508 on the authority of *Dorchester v. Webb*, Sir W. Jones, 345, that, "if the obligor makes the obligee executor, who agrees, the debt shall not be discharged, but he may retain assets to the value." Again, "if the testator make his creditor his executor, the action shall be released, but the debt remains, for which he may retain;" citing Plowd. Com. 186, Co. Litt. 264 b. If the action is released, it cannot be transferred, as here, by endorsement. [CRESWELL, J.—It may be a question whether Chief Baron Comyns was not dealing with debts which were not assignable.] A still more distinct authority upon the subject is Coke's commentary on the 445th section of Littleton, where it is laid down, that, "if the obligor make the obligee his executor, this is a release in law of the action, but the duty remains, for the which the executor may retain so much goods of the *testator." Upon which Mr. Butler adds this note,—“What Sir [*509 Edward Coke observes respecting obligors and obligees holds equally between all other creditors and debtors; but it must be attended with the following observations. A debt is only a right to recover the amount of the money by way of action; and, as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered but as a specific bequest or legacy devised to the debtor to pay the debt, and

(a) But see p. 1421, where the learned author says:—"With respect to that part of the estate of an executor or administrator which consists of choses in action, the law has long been settled, that, although debts of every description due to the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money: Com. Dig. *Assets* (D.); Bac. Abr. *Executors* (H.), pl. 2. So, if the executor or administrator recovers at law or in equity any damages or compensation for any injury done to the personal estate of the testator before or since his decease, or for the breach of any covenant or contract made with the testator,—Co. Litt. 124 a, 1 Roll. Abr. 920, *Executors* (G.), pl. 4, 5, Godolph. Pt. 2, c. 24, ss. 1, 2, Bac. Abr. *Executors* (H), pl. 2, Com. Dig. *Assets* (C.),—or with himself in his representative character,—all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted,—Went. Off. Ex. 14th edit. 191; and see per Parke, B., in *Smedley v. Philpot*, 3 M. & W. 586:† but he shall not be charged with them until he has reduced them into possession: Godolph. Pt. 2, c. 24, s. 5; *Jenkins v. Plume*, 1 Salk. 207, 11 Vin. Abr. 239, 240. Thus, in *Williams v. Jones*, 1 Campb. 364, in order to prove assets in the hands of the defendants, who were executors, an account rendered by them was given in evidence, in which they stated that 1000*l.* had been awarded as due to the testator's estate from a person who had been jointly concerned with him in underwriting policies of insurance: but Lord Ellenborough held, that this was not sufficient proof of assets, as it did not show that any part of the sum awarded had been received by the executors."

therefore, like other legacies, it is not to be paid or retained till the debts are satisfied; and, if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship. On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship, if there are assets, he may retain his debt out of the assets against the creditors in equal degree with himself; but, if there are not assets, he may sue the heir, where the heir is bound." The distinction between legal and equitable assets, if any exists, cannot affect the present question. Charles Peskett having been appointed, *and having acted as executor*, it is immaterial whether there were assets or not; the action is released. In *Fryer v. Gildridge*, Hobart, 10, Fryer brought an action of debt against Gildridge upon an obligation, whereby two were bound to a third jointly and severally. The obligee made the wife of one of the obligors his executrix, and died. The wife administered: then the husband, the obligor, made her his executrix, and died, leaving assets to pay the debt: then she died, and the plaintiff took administration of the goods and chattels of the *510] obligee *unadministered, and brought his action against the defendant, being the surviving obligor. And it was adjudged by all the court that the action would not lie; and one of the reasons given, is, "that, when the obligee made the wife of one of the obligors his executrix, the action was at least suspended, and the rule is that a personal action once suspended is extinct." (a) In *Freakley v. Fox*, 9 B. & C. 180 (E. C. L. R. vol. 17), 4 M. & R. 18, the payee and holder of a promissory note appointed the maker his executor, and it was held that the debt was discharged, and that no action could be maintained on the note, even by a person to whom the executor had endorsed it. Lord Tenterden there said: "On behalf of the defendant it was contended, that, by the appointment of the maker to the office of executor of the creditor, the note was discharged; so that an endorsement, even by the debtor himself, could not set it up and make it a binding instrument; and we are of that opinion. The expression used in the cases of *Wankford v. Wankford*, 1 Salk. 299, and *Cheetham v. Ward*, 1 Bos. & Pul. 630, is, that the debt is discharged. It is considered to have been paid by the executor to himself, and becomes assets in his hands. Upon this supposition the rule in equity depends which makes the executor accountable for the amount of his debt as assets. Upon the ground that the debt is gone, our judgment in this case must be for the defendant." And see the judgment of Lord Kenyon, in *Rawlinson v. Shaw*, 3 T. R. 557.

JERVIS, C. J.—I am of opinion that this rule should be discharged.

*511] Assuming that there were no assets, it *is contended that the immediate right of action is, to use the language of Chief Baron

(a) The report goes on,—“But the other reason is the suror, when the obligor made the executrix of the obligee his executrix, and left assets, the debt was presently satisfied by way of retainer, and consequently no new action can be had for that debt.”

Cromyns and Lord Coke, suspended. But it seems to me that those learned persons were discussing matters not assignable by law: they speak of the right of the executor to retain and pay himself; they do not mean that the cause of action is actually released and extinguished, but that the same person cannot both sue and be sued. If that be the reason, it does not apply to the case of a negotiable instrument, which may be transferred by endorsement and delivery. Upon that ground, I think, assuming that there were no assets, the fourth plea was not proved. As to the second ground upon which the rule was attempted to be supported,—it was not denied that the bare appointment of a creditor as executor operates no release or extinguishment of the debt: but it was said, that, inasmuch as Charles Peskett had taken possession of the house devised to him, the 240*l.* charged upon it was a present debt, though not presently payable, and therefore assets. I do not concur in the extent of the argument upon that point. But there are two objections to it which appear to me to be equally unanswerable. In the first place, the devise is to the defendant, Charles Peskett, of a house which by the terms of the will he is to enjoy for twelve months for nothing, and at the end of that time he is to pay 240*l.* I do not concur, that, because the testator afterwards appoints him one of his executors, he is therefore to pay the money down. That clearly was not the intention of the devise. But, in the next place, if that be not so, and the 240*l.* constituted debitum in præsentî, at the most it would only be equitable assets, and then a difficulty would arise as to the form of the pleadings. The plea alleges, that, at the time of the endorsement of the note, Charles Peskett had money, goods, and chattels of the testator in his hands available to the liquidation of the debt. That, *however, is not so with reference to the assets in question. [*512 The 240*l.* never was assets of the testator; but was convertible out of the legal estate after the testator's death. But I think there is a manifest distinction in this respect between legal and equitable assets. It is true, that an executor to whom a debt is due from his testator, has a right, in dealing with legal assets, to prefer himself to other creditors of equal degree; but it is otherwise as to equitable assets. Legal assets the executor is *bound* to distribute: equitable assets he *may* distribute, but in the distribution of them he is governed by the rules of equity. This opens a wide field of inquiry that was not entered into at the trial. I am of opinion that the rule should be discharged, because there were no assets in the hands of the executor, Charles Peskett, at the time of the endorsement of the note, which were available for the payment of this debt, and because the appointment of an executor, without such assets, is no discharge of a debt arising upon a negotiable security.

MAULE, J.—I am of the same opinion. This action is brought upon a note which is negotiable, and which continues to be so until payment.

It is alleged that there has been something equivalent to payment; for, it is said, that, as soon as Charles Peskett, to whom the testator had devised a freehold charged with the payment of 240*l.* within twelve months after his decease, to be applied in liquidation of his debts and legacies, accepted the office of executor, and took possession of the house, that operated as an extinguishment of the debt. I do not think that that is so. At the time of the endorsement of the note by Charles Peskett to the plaintiff, there was no money of the testator in his hands. There was a debt due from the estate, and due from the devisee upon his acceptance of the estate; but he was *not bound *513] to pay it before the expiration of the twelve months. At the time of the endorsement, therefore, Charles Peskett had never had either money or goods of the testator in his hands applicable to the payment of the note. That being so, he negotiated it. Lord Chief Baron Comyns says,—*Com. Dig. Administration* (B. 5),—that, “when an executor is indebted to the testator, his debt shall be released; for, the executor cannot maintain an action against himself:” and that, “if the testator makes his creditor his executor, the action shall be released, but the debt remains, for which he may retain.” The objection that the executor cannot sue himself, is a merely technical one, and does not affect the negotiability of the instrument, as is well expounded by the judgment of the Exchequer Chamber in *Harmer v. Steele*, 4 Exch. 1, 11. Unless actually paid, the right to negotiate continues, and the objection which would arise in the case put by Comyns does not exist. That shows that it is a debt which should be paid, but that a particular mode of obtaining payment cannot be had recourse to, because that would give rise to the incongruity of a man being both plaintiff and defendant. The right to retain is pointed out as remaining. I do not think it material to consider whether this money would be legal or equitable assets; for, until the 240*l.* was payable, I think there were no assets at all.

CRESSWELL, J.—It appears to me that the fourth plea was not proved in some material points. It does not rely merely upon the appointment and the acceptance of the office of executor. For the reasons given by my Lord and my Brother Maule, I think the appointment of Charles Peskett as executor, and his acceptance of the office, were not sufficient to prevent this action being maintainable. It may be true, that, under certain circumstances, the right to sue may be suspended *514] or gone, *as in the instances put by Comyns; but the debt remains. Here, the debt is not gone. This was a negotiable instrument which might lawfully be transferred notwithstanding the appointment of the payee to be the executor of the maker. The fourth plea is addressed to legal assets, and there was no evidence of legal assets. And, even supposing it may be extended to equitable assets,

there were no equitable assets in the hands of Charles Peskett at the time of the endorsement of the note by him to the plaintiff.

CROWDER, J.—I also am of opinion that the fourth plea was disproved. I think it is impossible to read it without seeing that it refers to legal assets. As at present advised, I think that the rule, as to the appropriation of legal assets, does not apply to equitable assets. It clearly was not enough to show the appointment of Charles Peskett as executor, and his acceptance of the office. The debt not being extinguished at the time of the endorsement, there could be no reason why it should not be assigned.

Rule discharged.

BRAUN v. MOLLETT. *May 28.*

The court declined to set aside a judge's order for the *vivâ voce* examination of the *plaintiff before issue joined*, which had been made upon an affidavit merely stating that he was a master mariner, that his evidence was material and necessary, and that he was about to sail for Stettin, and was not likely to be back in time for the trial.

THIS was an action brought to recover the sum of 90*l.* claimed by the plaintiff for eighteen days' demurrage of the ship *Elisé* under a charter-party entered into between the plaintiff and the defendant for a voyage from Pillau to London.

Before issue joined, viz. on the 24th instant, the plaintiff obtained an order of Williams, J., for his own *examination *vivâ voce* [*515 before the master, under the 1 W. 4, c. 22. This order was obtained upon the affidavit of one Bremer, the broker for the ship, which stated that the plaintiff was the master of the *Elisé* on the voyage in question, and was, in the deponent's judgment and belief, a material and necessary witness on his own behalf, and that the cause could not safely be taken to trial without his evidence; that the plaintiff was a master mariner, and was about to leave this country with his said ship the *Elisé*, for Stettin, in Prussia; and that he would probably sail about Sunday or Monday next, and was not likely to be in this country at the time the cause would come on for trial.

Vallings moved for a rule calling upon the plaintiff to show cause why the above order should not be set aside, and the evidence taken thereunder vacated (if taken), on the ground that the order had been granted upon insufficient materials. In *Finney v. Beesley*, 17 Q. B. 88 (E. C. L. R. vol. 79), it was held that the general rule of practice, under the 1 W. 4, c. 22, s. 4, is, that a commission to examine witnesses in a cause shall not be granted before issue joined: but that a commission may be so granted in an extreme case, and where without it justice would be defeated, by the exclusion of material evidence. In that case, the plaintiff applied for the commission immediately after action brought, and before declaration, intending to try at the next assizes, and the

party whom it was proposed to examine was a witness to actual promises, and was to sail in five days for Port Natal, in South Africa, purposing to remain there eighteen months; and the court allowed the commission to go, considering it a case of such extreme urgency as to justify a departure from the established practice. Here, there is nothing to justify an extraordinary interposition in the plaintiff's favour. The *516] affidavit does not state *how long the plaintiff is likely to be absent: and before issue joined the defendant could not effectually cross-examine him. It must be assumed, since the case of *Castelli v. Groome*, 21 Law Journ. Q. B. 308, that the 1 W. 4, c. 22, applies to parties to the suit who are made admissible as witnesses by the 14 & 15 Vict. c. 99, s. 2. But the question is, whether a party can be examined under a commission, or *vivâ voce*, before issue joined. Lord Campbell, in the case last cited, says,—“I do not mean to lay down any general rule as to the right of having a commission to examine parties; but I think it lies upon the person applying to the court to show that it would be conducive to the due administration of justice that the commission should issue; and that it is not enough to show that the plaintiff or defendant lives out of the jurisdiction of the court. It would lead to most vexatious consequences, if constant recourse could be had to this power, and it would be so in all cases where the parties wished to avoid the process of examination here.”

JERVIS, C. J.—The statute 1 W. 4, c. 22, s. 4, allows the examination of a *witness* before issue joined. The 14 & 15 Vict. c. 99, s. 2, allows the parties to the cause to be examined as witnesses, subject of course to all the incidents applicable to the examination of witnesses in a cause, one of which is that they may be examined upon interrogatories or by commission, or *vivâ voce*, upon a proper case being made out. I think there is nothing in the objection at all.

The rest of the court concurring,

Rule refused.

*517] *MORTON v. COPELAND. June 4.

The Dramatic Copyright Act, 3 & 4 W. 4, c. 15, s. 2, imposes a penalty for the representation at any place of dramatic entertainment, “without the consent in writing of the author or proprietor,” of any dramatic piece, the sole liberty of representing which is by s. 1 secured to such author or proprietor:—Held, that the consent need not be under the hand of the author or proprietor himself, but may be given by an agent.

In an action for penalties, the onus of proving the consent of the author or proprietor lies upon the defendant.

The plaintiff was a member of a society called The Dramatic Authors' Society. This society issued lists of the several dramas composed by its members, with the prices charged for each night's performance, if represented with the consent of the secretary, such permission to be granted conditionally on the party representing the piece furnishing a monthly file of bills, and payment within a given time after the account rendered. The latest of these lists was published in 1846. In 1849, the secretary gave the defendant a written permission in these terms,—“Mr. C. has permission to play dramas belonging to the authors forming the Dramatic

Authors' Society, upon his punctual transmission of monthly bills, and payment of the prices for the performances of such dramas." The plaintiff sued the defendant for penalties for representing three dramas composed by him since the year 1849 :—

Held, that the license so given by the secretary (the authorized agent of the plaintiff for that purpose), coupled with the original list and prospectus, applied to the dramas composed by members of the society after the date of the license, as well as to those composed before.

THIS was an action for penalties against the proprietor of a theatre, for performing dramatic pieces without the consent of the author.

The first count of the declaration stated, that theretofore, and before the committing of the grievances by the defendant thereafter mentioned, and after the passing of a certain act of parliament made and passed in the third year of the reign of His late Majesty King William the Fourth, intituled "An Act to amend the laws relating to dramatic literary property" (3 & 4 W. 4, c. 15), to wit, on the 1st of January, 1854, the plaintiff did compose, print, and publish a certain dramatic piece called "My Precious Betsy," and from the time the same was so composed, printed, and published as aforesaid, hitherto, the plaintiff hath been and still is the proprietor thereof, and during all the time aforesaid has had, as of his own property, the sole liberty of representing, or causing to be represented, the said dramatic piece at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain and Ireland and in the Isles of Man, Jersey, *and Guernsey, or in any other part of the British do-
minions : Nevertheless, the plaintiff said, that, after the making [*518 and passing of the said act of parliament, and within twelve calendar months next before the commencement of this suit, and also whilst the plaintiff was such proprietor of the said dramatic piece as aforesaid, and had such sole liberty of representing or causing to be represented the same as aforesaid, and during the continuance of such sole liberty as aforesaid, on five several occasions, to wit, on, &c., he the defendant, contrary to the intent of the said act of parliament, and the right of the plaintiff as such author as aforesaid, and without the consent in writing of the plaintiff first had and obtained, did cause certain parts of the said dramatic piece to be represented at certain places of dramatic entertainment in England, to wit, on, &c., aforesaid, at the Theatre Royal, Liverpool, in the county of Lancaster, and on, &c., aforesaid, at the Royal Amphitheatre in Liverpool aforesaid, contrary to the form of the statute in such case made and provided, and the true intent and meaning thereof, and contrary to the right of the plaintiff as such author as aforesaid, and also to his great injury, loss, and damage ; whereby, and by force of the statute in such case made and provided, the defendant, in respect of each and every of the said representations, became liable to pay to the said plaintiff, so being such author and proprietor as last aforesaid, and having such sole liberty as aforesaid, an amount not less than 40s., or the full amount of the benefit or advantage arising from each and every such representation, or the injury or

loss sustained by the plaintiff therefrom, whichever should be the greater damage; and the plaintiff said that the sum of 40s. was the greatest damages recoverable by the plaintiff, according to the form of the statute in such case made and provided, in respect of each and every of *519] such *representations of the said piece by the defendant as in that count mentioned,—whereof the defendant had notice; whereby, and by force of the statute in such case made and provided, an action had accrued to the plaintiff to demand and have of and from the defendant the five several sums of 40s., making together 10l.

In the second count the plaintiff claimed 16l. in respect of eight representations, at the same theatres, of a dramatic piece, called "Going to the Derby," of which he was the author; and in the third count he claimed 28l., in respect of fourteen representations of a certain other dramatic piece, at the same theatres, called "A Desperate Game," of which also he was the author.

The defendant pleaded not guilty to the whole declaration, and also to each count,—first, that, on each of the several occasions in that count mentioned, he had previously obtained the plaintiff's consent in writing to his causing the said parts of the said piece therein mentioned to be so represented,—secondly, that, *after* action, he satisfied and discharged the claim of the plaintiff to which that plea was pleaded, by payment,—thirdly, that *before* action, he satisfied and discharged the claim of the plaintiff to which that plea was pleaded, by payment. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings at Westminster after the last term.

The plaintiff is a dramatic author: the defendant is the proprietor and manager of two places of public amusement in Liverpool, called respectively The Royal Amphitheatre, and The Theatre Royal.

The 1st section of the statute 3 & 4 W. 4, c. 15, intituled "An act to amend the laws relating to dramatic literary property," secures to the author or his assignee the sole liberty of representing his productions in England, &c.: and s. 2 enacts, "that, if any *person *520] shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act, or right of the author or his assignee, represent, or cause to be represented, without *the consent in writing of the said author* or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable, for each and every such representation, to the payment of an amount of not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietor, in any court having

jurisdiction in such cases in that part of the said United Kingdom, or of the British dominions, in which the offence shall be committed; and in every such proceeding, where the sole liberty of such author or his assignee shall be subject to such right or authority as aforesaid (s. 1), it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same."

Shortly after the passing of this act, a number of dramatic authors, amongst whom was the plaintiff, united themselves together into a society for their mutual protection, which they called "The Dramatic Authors' Society."

In the year 1840, the society printed and circulated an alphabetical list of pieces, MSS. and printed, written by and the property of the members, made up to the 1st of May in that year, with the prices charged for each night's performance annexed thereto, and a notification that *the "written permission as required by the act might [*521 be obtained of the secretary, conditional on the furnishing a monthly file of bills, and paying the accounts within a fortnight after they have been sent by the post." The conditions upon which such permission was to be granted were contained in the following prospectus, which was annexed to the above-mentioned list:—

"On publishing their new list of dramas protected by the act of 8 & 4 W. 4, c. 15, the members of the Dramatic Authors' Society request the particular attention of managers to the following observations:—

"1. The act renders it imperative upon the manager to obtain the permission of the author or his assignee, *in writing*, before the representation of the drama. In order, therefore, to obviate the difficulties in which very distant provincial managers might be placed, and generally to facilitate the operation of this act, this society was established, by which managers, instead of being compelled to correspond with and account to every individual member, were at once placed in communication with *one recognised agent*, and saved incalculable trouble and inconvenience.

"2. That, by the arrangement of this society, managers who are willing to forward punctually to the society a monthly file of bills, (a) receive a conditional permission, by which they are enabled to advertise and perform any drama belonging to a member of the society, without being subject to the delay of first obtaining that permission in writing, and, in almost every instance, with knowledge of the exact expense they are incurring.

"3. That, in order still further to simplify the *business, and [*522 avoid mistakes and altercations, it has been determined to affix in the new list the price of each performance to every particular drama,

(a) Bills of the nightly performance, to enable the secretary of the society to make out their account against the proprietor or manager of the theatre.

instead of forwarding a scale, which it was impossible continually to adhere to, as, of course, it could not fairly be supposed to apply to novelties in the height of their attraction, as well as to dramas thirteen years old. Managers will, however, find that the prices of that scale have been generally kept in view, the principal alteration being with regard to the newest and most popular one-act pieces, which, in the present state of theatricals, have assumed an importance they never before possessed; frequently, indeed, forming the staple of the evening's amusement. Such one-act pieces, therefore, will be generally found charged as two acts; and, as the author's own valuation is precisely fixed, it is of course at the option of the manager to incur that expense or not, or, as a middle course, to arrange with the author for the right of performance for the season, or a limited number of nights. It is also the intention of the society to reprint their list annually, with the addition of dramas produced during the year last past; and to make at the same time such reductions in the prices of the older dramas as may appear reasonable. The novelties of the current year must, of course, be a matter of particular agreement.

"4. The society has much gratification in remarking that it has had little or no disagreement with any respectable manager; such slight misunderstandings as must occasionally take place having been always amicably and satisfactorily arranged. Its members, therefore, have no fear of being misunderstood, when they state, that, as they have collectively determined never to have recourse to legal proceedings until every other mode of application has failed, so they are individually *528] resolved, when they are once compelled to commence *such proceedings, to carry them to the fullest extent the act will permit."

The last of these lists issued by the society was issued on the 13th of June, 1846.

Some years back, the defendant had a dispute with the society; and, upon that dispute being arranged, he applied to the secretary, Shearman, for permission to represent the plays the property of members of the society, without incurring the risk of penalties under the act. This permission was granted by Shearman by a written memorandum in the following terms:—

"2d March, 1849.

"I hereby undertake that no action shall be brought against Mr. Copeland with respect to the account already delivered for dramas played by him, he having satisfied that account. And Mr. Copeland has permission to play dramas belonging to the authors forming the Dramatic Authors' Society, upon his punctual transmission of monthly bills, and payment of the prices for the performances of such dramas.

(Signed) "MONTAGUE SHEARMAN."

The defendant, relying upon this permission, continued from that period to represent several of the plays belonging to members of the

society, and contained in their published lists, and amongst others the three pieces the representation of which formed the subject of this action. It appeared, however, that, although the defendant had from time to time transmitted to the secretary bills of the performances at his theatres, they had not been sent *monthly*, in strict compliance with the note of Mr. Shearman.

Further disputes arising between the parties as to certain alleged errors and overcharges in the accounts sent by the secretary to the defendant, the present action was brought to enforce the penalties under the act.

The three pieces "My Precious Betsy," "Going to *the Derby," and "A Desperate Game," were not contained in any [*524 schedule; and indeed none had been published since the year 1846. The plaintiff was a member of the Dramatic Authors' Society at that time, and is so still.

The defendant admitted the performance of the dramas mentioned in the declaration on the days and at the places of dramatic entertainment also mentioned in the declaration, and that the plaintiff was the author of such dramas. The plaintiff also admitted that Mr. Montague Shearman was the secretary and solicitor of the Dramatic Authors' Society, and that the plaintiff was a member thereof. Certain payments on account were also admitted.

For the plaintiff it was insisted, that, unless it was shown that the representations took place with the consent in writing of the author, the defendant had incurred the penalties mentioned in the act, and the plaintiff was entitled to a verdict.

For the defendant it was insisted, that, inasmuch as this was a penal action (which was denied by the plaintiff's counsel), it was incumbent on the plaintiff to prove the *absence* of consent.

His Lordship, referring to the statute, ruled that it was for the defendant to prove that he had the consent of the author; and he declined to nonsuit the plaintiff.

The defendant then relied upon the consent given him by Mr. Shearman: and ultimately a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a verdict for him, or a nonsuit, if the court should be of opinion that the consent of Shearman was a sufficient consent within the statute.

E. James, on a former day in this term, accordingly obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, or for a new trial, on the ground of *misdirection and that the verdict was against evidence,—on the grounds, "that the plaintiff did not prove, [*525 that he had not given such consent as in the declaration alleged; that the defendant did not cause the dramatic pieces mentioned in the declaration, or any or either of them, or any part or parts thereof, to be represented, contrary to the act of parliament mentioned in the

declaration, and that it was so proved by the evidence; that the defendant did not cause the said dramatic pieces, or any of them, or any part or parts thereof, to be represented, contrary to the right of the plaintiff, and without the consent in writing of the plaintiff, contrary to the form of the statute, and the intent and meaning thereof, as alleged, and that it was so proved by the evidence; that the evidence did not, and was not sufficient to, prove that the defendant was guilty, as alleged, and did prove that the defendant had obtained the plaintiff's consent in writing, as alleged in the second, fifth, and eighth pleas, and at all events was not sufficient to prove, that he had not obtained such consent; that there was evidence sufficient to prove, and which did prove the third, fourth, sixth, seventh, ninth, and tenth issues in favour of the defendant; that it was not incumbent on the defendant to prove that he had the consent in writing of the plaintiff, signed by or in the handwriting of the plaintiff, for the representations mentioned in the declaration; that the plaintiff was, under the circumstances proved at the trial, estopped from saying that the defendant was not justified in causing the said dramatic pieces to be represented, and from saying that the defendant had not a sufficient consent for such representations, and from suing for the sums for which this action was brought, and that the jury ought to have been so directed; that, upon the evidence, the defendant was entitled to a verdict upon each of the counts in the declaration, *526] and the jury *ought to have been so directed; and that there was evidence upon which the jury would have been justified in finding a verdict for the defendant, and that the jury ought to have been so directed."

J. A. Russell now showed cause.—The 1st section of the 3 & 4 W. 4, c. 15, after reciting the copyright act of 54 G. 3, c. 156, and that "it was expedient to extend the provisions of the said act," enacts "that, from and after the passing of this act, the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof, or his assignee, or the assignee of such author, (a) shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever in any part of the united kingdom of Great Britain and Ireland, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof, or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this act, by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this act, or from the time of such publication

(a) *Sic.*

respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and *shall be deemed and taken to be the proprietor thereof: Pro- [527] vided, nevertheless, that nothing in this act contained shall pre-
 judice, alter, or affect the right or authority of any person to represent, or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this act, have given his consent to or authorized such representation, but that such sole liberty of the author or his assignee shall be subject to such right or authority." And the 2d section imposes certain penalties on persons performing dramatic pieces contrary to the act, "without the consent in writing of the author or other proprietor first had and obtained." Here, the consent in writing of the author had not been obtained. The proof of the want of such consent was no part of the plaintiff's case. In *The Apothecaries' Company v. Bentley*, R. & M. 159 (E. C. L. R. vol. 21), where the declaration in an action on the 55 G. 3, c. 194, s. 14, averred that the defendant practised as an apothecary "without having obtained such certificate as by the said act is required," it was held that the onus of proving that the defendant *had* obtained his certificate lay with him. In *The King v. Turner*, 5 M. & Selw. 206, which was there cited, Bayley, J., says: "I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it is, and who asserts the affirmative, is to prove it, and not he who avers the negative." The statute in question creates a new description of property: it gives to the author of a dramatic piece a property in the right to represent it, and prohibits the invasion of that right without "the consent in writing of the author." It is admitted that there had been no consent in writing of the author before the performance by the *defendant of the pieces now in [528] question: but it is contended that there had been something equivalent to such consent. The question is, whether the words of the statute are satisfied by the consent of an agent of the author, or whether there must not be the consent in writing of the author himself, that is, signed by the author himself. [MAULE, J.—The statute does not say the consent shall be signed by the author; but it must be *his* consent, and it must be in writing. If the author issues or acts upon it, is it not his consent?] The written consent or permission of Shearman is of a date anterior to the composition of either of the pieces in question. Had Shearman power prospectively to bind every one who might

become a member of the Dramatic Authors' Society? To satisfy the statute, the consent either must be altogether in the handwriting of the author or proprietor, or it must be signed by him, or there must be specific evidence that it was issued by him. The act must be construed so as to further the object of the legislature, viz. to benefit authors; and the court will not permit their rights to be interfered with without the consent required by the act. [MAULE, J.—The authors who have chosen to establish this society, have no doubt done it with a view to their own benefit. It strikes me that such a construction as will make what they have done valid, is the best construction for them. Questions somewhat analogous have arisen on the 9 G. 4, c. 14, s. 1; and it was held in *Hyde v. Johnston*, 2 N. 776, 3 Scott, 289, that the written acknowledgment required by that statute, to take a case out of the statute of limitations, 21 Jac. 1, c. 16, must bear the actual signature *of the party to be charged thereby*; the signature of an agent will not suffice. "Looking," says Tindal, C. J., "at the words of the statute, it is confined in terms to a writing 'signed by the party chargeable thereby:' and, as the effect of that statute

*529] ^{is, for the first time to introduce a legislative exception into the} statute 21 Jac. 1, c. 16, and thereby pro tanto to repeal it, we do not feel ourselves justified in extending such exception beyond the plain and unambiguous meaning of the words employed therein. The legislature has, in many statutes, given equal efficacy to written instruments when signed by the parties and when signed by their agents: but, in all those cases, express words have been employed for that purpose. The statute of frauds, in its 8d section, requires for the purposes of that section a note in writing to be signed by the parties 'or their agents thereunto lawfully authorized *by writing*:' in the 4th section, a memorandum or note in writing is required 'signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized:' in the 5th section, a devise of lands is required to be made in writing, to be 'signed by the party so devising, or by some other person in his presence and by his express directions:' in the 7th section, a declaration of trusts of any lands shall be in writing, 'signed by the party:' and, lastly, the 17th section requires, upon the sale of goods, that there shall be some note or memorandum in writing of the bargain, 'signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.' It appears, therefore, that the legislature well knew how to express the distinction, not only between a signature by the party and a signature by his agent; but also to describe the different modes by which agents for different purposes are to be appointed. The same observation arises upon referring to the more recent statutes, 3 & 4 W. 4, c. 27, s. 42, and c. 42, s. 5. When, therefore, we find in the statute now under consideration that it expressly mentions the signature by the party only, we think it a safer construe-

tion to adhere to the precise words of the statute, and that we should *be legislating, not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent." Upon the plain words of the act, therefore, as well as upon the authority of *Hyde v. Johnson*, it is submitted that the consent in writing of an agent will not suffice. Besides, the permission which Shearman, the secretary, was authorized to give, could only apply to the pieces scheduled in the published lists. Again, the permission was conditional upon the furnishing a monthly file of bills, and due payment of the accounts; and this condition was not complied with. [JERVIS, C. J.—It was a condition subsequent. No such objection was made at the trial.] [*530]

E. James and *Hawkins*, in support of the rule.—The consent or permission given by Shearman to the defendant was a sufficient consent in writing within the statute. The act does not say that the consent shall be under the hand of the party, or "signed by the party," as in the 9 G. 4, c. 14, s. 1; but the words are general, "the consent in writing of the author." Whatever may be done by the party himself, may, in the absence of express words of restriction, be done by an agent. Under the statute of 3 & 4 Anne, c. 9, s. 5, which enacted that no acceptance of an inland bill of exchange should be sufficient to charge any person whatsoever, unless the same were underwritten or endorsed in writing thereupon,—an acceptance under the hand of an agent was held sufficient. There are numerous enactments marking the distinction between documents which are required to be signed by or for a party. Thus, the 79th section of the poor law amendment act, 4 & 5 W. 4, c. 76, requires a "notice in writing" of his being chargeable, to be given prior to the removal of a pauper; and, in a subsequent part of the same section, a consent of the overseers or guardians is to be "by writing under *their hands." Suppose Mr. Morton had been present when Mr. Shearman signed the memorandum of the 2d of March, 1849, and it had been so signed at his express request, could it be said that it was not such a consent in writing as would bind him? Shearman having been put forward as a person authorized to give consents on behalf of the several members of the society, there was ample evidence whence the jury might infer, if necessary, that he had the written authority of each member for that purpose. Then, how stands the matter with regard to the document itself? Morton was a member of the society in 1846, and he is admitted to be so now. [*531]

JERVIS, C. J. (stopping *Hawkins*).—My learned Brothers are of opinion, and I entirely concur with them, that I was wrong in the opinion I expressed at the trial, and that the memorandum of the 2d of March, 1849, does, under the circumstance, amount to a consent in writing of the author. I therefore think the rule to enter a nonsuit ought to be made absolute. Mr. *Russell* contends, first, that the con-

sent required by the statute cannot be given by an agent, and therefore that this was not such a consent in writing of the author as will satisfy the statute. That, however, depends upon the way you read the statute. The 1st section confers upon the author of any dramatic piece, as his property, the sole liberty of representing it or causing it to be represented at any place of dramatic entertainment in England, &c.: and the 2d section enacts, "that, if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of the act, or right of the author or his assignee, represent or cause to be represented, *without the consent in writing of the author* or other proprietor first had and obtained, at any place of dramatic entertainment within *532] the limits aforesaid, any such production as aforesaid, or *any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of the act." If you read the words "without the consent in writing of the author," as if they had been "without the consent *in the writing of the author*," it might be in favour of the view contended for by Mr. Russell. But in truth it means "without *the author's consent* in writing,"—that is, it must be the consent of the author, and it must be in writing, which may either be the writing of the author himself, or that of some agent by him duly authorized. Now, was Mr. Shearman, at the time he gave the consent, the agent of Mr. Morton? Mr. Morton was, it appears, a member of The Dramatic Authors' Society in 1846, when the last list or schedule was published: he was a member also in 1849; and the admissions show that he is a member still. We must, therefore, take it that he was a member at the time the consent was signed by Shearman. Now, if the consent had been given by Mr. Morton's express authority, there could be no doubt upon the construction of the statute; and, Morton being a member of the society, and Shearman the secretary and accredited agent of the society, it seems to me that his signature was sufficient. If Shearman had written, "I, as agent of Mr. Morton, authorize you to play dramas belonging to the authors forming The Dramatic Authors' Society," upon the facts admitted I think there can be no doubt that that would have been a sufficient consent in writing by Morton to satisfy the terms of the statute, and to protect the defendant from penalties. Two objections *533] have been urged by Mr. Russell against allowing the paper in question to have this operation. In the first place, it is said that the three pieces which the defendant is charged with having represented without the author's consent, were not in existence, had not been composed, at the time of Shearman's supposed consent, and that

Shearman could at the most only be authorized to give consent as to dramas the titles of which had been published by the society. There is nothing, however, in the memorandum so to limit it. "Mr. Copeland has permission to play dramas belonging to the authors forming The Dramatic Authors' Society," upon his complying with certain conditions. If the matter were doubtful upon the memorandum itself, the rules and regulations attached to the schedule issued in June, 1840, remove that doubt. They contain an express intimation of an intention on the part of the society to issue periodical lists of new dramas which might from time to time be brought out by the members; and the third rule evidently shows that it was contemplated that such new dramas should be subject to the same regulations with regard to the permission to represent them, as those which had already been scheduled. It is plain they contemplated that the secretary should have authority to give permission to perform not only those dramas which were inserted in the lists already issued, but also those which might be inserted in future schedules. Then it is further insisted, that, assuming Shearman to have been duly authorized to give the consent, the consent was conditional only on the furnishing a monthly file of bills, and payment of accounts within a fortnight after they have been sent by the post. This, however, was a condition subsequent. The license takes out the sting of the penalty at the time of the representation. The result of the agreement, as it seems to me, *is, that the parties consent to turn [*534 the penal provisions of the act of parliament into a civil remedy. Instead of suing for penalties as for an unauthorized representation of their works, by mutual agreement they convert the author's claim into an assumpsit. That is the course that should have been taken here; and then the real question between the society and the defendant would have been fairly tried. For these reasons, I am of opinion that the view I took at the trial was an erroneous one, and that the plaintiff ought to have been nonsuited. The rule, therefore, will be made absolute.

MAULE, J.—I am of the same opinion. The question raised at the trial, was, whether the defendant, who was sued for penalties under the Dramatic Copyright Act, 8 & 4 W. 4, c. 15, had performed certain dramas the property of the plaintiff, being a member of a certain society calling themselves The Dramatic Authors' Society, without the consent in writing of the author. My Lord Chief Justice then thought that a document which was put in by the defendant did not amount to such consent, and thereupon the defendant had a verdict against him, with liberty to move to enter a nonsuit if the court should think upon more full inquiry that the consent was sufficient within the statute; and a rule for that purpose has accordingly been obtained. It appears to me that the memorandum in question was a sufficient consent within the terms of the statute. That which the statute requires, is, "the con-

sent in writing of the author or proprietor." Now, it appears to me that this was the consent of the author, and it was in writing. The statute does not say that the consent shall be written by the author, or signed by him, or indeed by anybody. It is objected to this document, *535] *that it was not written by the author or signed by him. The statute simply requires that the consent shall be his act, and that it shall be in writing. One object of requiring it to be in writing evidently is, that the terms of the consent may be beyond the possibility of doubt or dispute. That object is attained perfectly, whether it be in the handwriting of the party himself or not. There may sometimes be another object to be attained by requiring an instrument to be in writing, viz., to identify the act as the act of the party, as in the case of a will, and in other instances mentioned in the statute of frauds, 29 Car. 2, c. 3, where the instrument is expressly required to be signed by the party to be charged thereby. In those cases, the signature of the party serves to identify the writing as the very writing by which the party is to be bound. In some of the cases provided for by that statute, the signature may be either that of the party himself, or that of an "agent thereunto lawfully authorized by writing," as in the case of leases, s. 3; or of "some other person thereunto by him lawfully authorized," as in the case of agreements, s. 4; or by "some other person in his presence and by his express directions," as in the case of a devise of land, s. 5, or "in his presence and by his directions or consent," s. 6; or by "their agents thereunto lawfully authorized," as in the case of the sale of goods, s. 17. The necessity of signature arises in every case from the express requirement of the statute. Signature does not necessarily mean writing a person's christian and surname, but any mark which identifies it as the act of the party. (a) I cannot call to mind any document which by the law of this country requires to be written entirely by the person who is to be bound by it,— *536] a *holograph. (b) In the statute now under consideration, not a word is said about whose writing the document shall be: it merely seems designed to exclude that kind of doubt and uncertainty which arises from the circumstance of a thing not being evidenced by writing at all. That object is completely secured by the sort of permission held out by the prospectus of this society: and the regulations they have adopted for the purpose of preventing evasion of the statute, seem to me to be quite adequate for that purpose. As soon as that prospectus and list of dramas belonging to members of The Dramatic Authors' Society was published, or to be met with at the office of their secretary, and the manager of a theatre represented any of those dramas

(a) Provided it be proved or admitted to be genuine, and be the accustomed mode of signature of the party.

(b) By the law of Scotland, holograph deeds enjoy some peculiar privileges: see Bell's Dict. of the Law of Scotland, Vol. 2, p. 47, 3d edit.; 1 Bell's Commentaries on the Laws of Scotland, 5th edit. p. 324.

upon the faith of the statements so put forth, his so doing, I think, amounted to the becoming a party to an agreement with the respective authors that he should be at liberty to represent them on his sending bills and paying the prices affixed for each night's performance. That involves the consent in writing of the author, who, by continuing a member of the society, authorizes the secretary to do what he has done here. It is said that the three pieces in question were not in existence at the time the consent in this case was given. That may be so. But there is no reason why a man should not consent to the performance of any dramas he may hereafter produce, and to place them amongst the common stock of the society when written. It seems to me that the grounds upon which this document is objected to as not being a sufficient consent within the statute, entirely fail. I think this was a very deliberate consent, given upon full consideration, and on terms which are thought *reasonable by many dramatic authors of repute. I therefore feel glad to be able to give effect to it. It seems to me [*537 that there was no reason for bringing the action. The plaintiff had no ground of complaint whatever against the defendant, who seems to have performed his part of the agreement. I am clearly of opinion that this was such a "consent in writing of the author," as to exempt the defendant from penalties for representing the dramas, or plays, or farces, or whatever they may be, in question.

CRESSWELL, J.—I also am of opinion that the rule should be made absolute to enter a nonsuit. The first question is, whether the document relied on by the defendant was a sufficient consent in writing of the author to satisfy the statute 3 & 4 W. 4, c. 15, s. 2. I think it was. There was evidence that it was given by a person authorized to give it; and it is in writing. There is nothing in the act requiring it to be signed by the author himself. Suppose a letter had been addressed by the defendant to Mr. Morton asking permission to perform these three pieces, and an answer had been returned, written and signed by Shearman, to this effect,—“I am instructed by Mr. Morton to say, that, upon such and such terms, you are at liberty to perform so and so,”—the same question would have arisen; and, could anybody doubt for a moment what the result would have been? The consent given here is given, not on behalf of Mr. Morton only, but on behalf of all the authors who are members of the society. The next question is, whether the consent which was given in 1849, is limited to then existing dramas, or extends to future productions. It seems to me to be large enough to apply to all. If the members of the society, or their secretary, had intended to limit it in the way suggested, *they should [*588 have done so in terms. So far from there being any such express limitation, it seems to me that the printed regulations, which speak of lists to be from time to time issued, evidently contemplate future pro-

ductions of the society's members, and that the license when once granted, was intended to be applicable to future schedules.

CROWDER, J.—I am of the same opinion. It was at first urged by Mr. *Russell* that there was no consent in writing of the author within the meaning of the statute, because the consent was not in the handwriting of the author, or signed by him. But, when the words of the act are looked at, I find that the consent is not, as in the cases relied on by the plaintiff, required to be signed by the party. All that is required, is, that the consent of the author shall be in writing. Then it was said, that, assuming that the consent may be written or signed by an agent, there was no evidence here that Shearman was authorized to sign this document as agent for Mr. Morton. Looking, however, at the relative position of the parties,—that Mr. Morton was a member of The Dramatic Authors' Society, and Mr. Shearman their secretary, and that the prospectus and lists were issued by the society, showing how and upon what terms permission to perform the several pieces was to be obtained,—I think it is impossible to say that Shearman was not duly constituted Morton's agent to give such consent. It was further insisted, that, at all events, the consent did not apply to the three pieces in question, inasmuch as they were not in existence at the time the document was given, and that the consent must be confined to then existing dramas. It seems to me, however, that that is not so. The words of the document are general. It is quite clear that the consent might be *a prospective consent, and that it was intended
*539] that it should be an authority to the defendant to act any plays which might thereafter be brought into the common stock of the society.
Rule absolute for a nonsuit.

GEORGE v. JAMES SOMERS the Younger. *May 29.*

A discharge under the insolvent debtors act does not prevent the party being committed by a county court judge, upon a judgment-summons, under the 9 & 10 Vict. c. 95, ss. 98, 99, in respect of an unsatisfied judgment, though inserted in the schedule.

A PLAINT was levied in the county court of Kent holden at Rochester, by George against James Somers the younger. At the hearing, on the 7th of March last, the defendant was adjudged to pay the debt and costs on a given day. On the 27th of April, the defendant obtained his discharge under the insolvent debtors act, 1 & 2 Vict. c. 110, s. 75, the judgment-debt being duly inserted in his schedule. On the 10th of May, the defendant was brought up before the judge of the county court on a judgment-summons, and committed to prison for forty days.

G. Francis now moved for a rule calling upon the plaintiff and the judge of the county court to show cause why the defendant should not

be discharged out of custody, on the ground that the debt in respect of which he was committed was so far satisfied by the discharge under the act, as to relieve him from liability to be taken in execution thereon. By the 75th section of the 1 & 2 Vict. c. 110, the insolvent is to be discharged as against all debts and claims mentioned in his schedule. By s. 87, before adjudication, the prisoner is required to execute a warrant of attorney to confess judgment for the amount of the debts mentioned in his schedule. And s. 90 enacts "*that no person who shall have become entitled *to the benefit of the act by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by* [^{*540} reason of the judgment so as aforesaid entered up against him or her according to the act, or *for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same*; but that, upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any judge of the court from which any process shall have issued in respect thereof, and such judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by this act required, being given to or acknowledged by the plaintiff on such process, or being by him dispensed with by the acceptance of a dividend under this act, or otherwise," &c. [JERVIS, C. J.—Can we interfere with the judgment of a court of competent authority?] The court did so interfere in the case of *Ex parte Pardy*, 1 L. M. & P. 16. Application has already been made to the judge of the county court for the defendant's discharge, but without avail. [JERVIS, C. J.—Is not the proper course,—suppose it to be the imperative duty of the judge of the county court to discharge the defendant,—to apply to the Court of Queen's Bench for a mandamus to compel him to do so?] An application has been made to the Court of Queen's Bench, not for a mandamus, but for the discharge of the defendant; but that court refused to interfere, upon the authority of *Abley v. Dale*, 11 C. B. 378 (E. C. L. R. vol. 73), where this court held, **that* [^{*541} one who has obtained his discharge under the insolvent debtors act, is still liable, at the discretion of the judge of the county court, to be committed, under the 99th section of the 9 & 10 Vict. c. 95, for disobedience of an order made upon a judgment-summons under section 98, obtained after such discharge. But that case, it is submitted, has been very much shaken, if not expressly overruled, by the recent case of *Ex parte Dakins*, *antè*, p. 77, where it was held, that a "priest in ordinary of Her Majesty's chapels royal" is privileged from arrest on

process of the county court, under s. 99, for non-attendance on a judgment-summons,—such process being in the nature of *execution*, and not *merely* process of contempt. [JERVIS, C. J.—Ex parte Dakins did not affect to overrule the well-considered judgment of this court in *Abley v. Dale*.] The exemption from arrest under the 90th section of the insolvent debtors act is equivalent to privilege. [JERVIS, C. J.—In Ex parte Dakins, we felt ourselves in a great measure bound by the decision of Patteson, J., at Chambers, in the case of the Queen's footman. The 98th section of the 9 & 10 Vict. c. 95, which authorizes the application for a judgment-summons, speaks of "unsatisfied judgments." Is not this an unsatisfied judgment?] It may be said that the judgment is in some sense satisfied by the substituted remedy provided by the 87th section of the 1 & 2 Vict. c. 110. It is scarcely possible to distinguish Ex parte Dakins, in principle, from *Abley v. Dale*. [MAULE, J.—The privilege set up in Ex parte Dakins was the privilege of the Queen.] Here, the privilege is that of the defendant's creditors. The party can only obtain his discharge by withdrawing from his other creditors a portion of the fund which the law says shall be equally distributed amongst them. [MAULE, J.—Not necessarily: some friend may be inclined to aid him.] That is too improbable a speculation to afford *542] foundation for a legal judgment. [JERVIS, C. J.—Can you expect us to overrule the case of *Abley v. Dale*, when the Court of Queen's Bench has declined to do so? You had better try the Exchequer.] All the court is asked to do, is, to give such a construction to the 90th section of the insolvent debtors act as will prevent its being an absolute nullity so far as county court judgments are concerned. [MAULE, J.—The imprisonment under the 99th section is a punishment which the county court judge has a right to inflict upon the debtor, where he has been guilty of any of the misconduct described in that section. But, where the prerogative of the Crown steps in and says, "You have an officer of mine in prison; let him be discharged,"—the courts say that the right of the creditor to call upon the judge to punish the refractory debtor, is subservient to the prerogative of the Crown, and therefore that particular remedy shall not be enforced against him.] The question is, whether the statutory enactment declaring the party to be entitled to his discharge, is not at least as effective as the claim of privilege. [MAULE, J.—The case of a commitment for misconduct was not contemplated by the insolvent debtors act. JERVIS, C. J.—There had been some difference of opinion amongst the judges as to the effect of a commitment under the 99th section of the county court act, prior to the case of *Abley v. Dale*; but I believe the correctness of that decision has never been impugned. An act for the further regulation of county courts has been passed since that case was decided;(a) and there was no suggestion that it was wrong. It was a well-considered

(a) 15 & 16 Vict. c. 54.

case; especially by my Brother Williams, who took great pains in the matter.] The defendant relies upon the express words of the 1 & 2 Vict. c. 110, s. 90.

JERVIS, C. J.—Every point that could be urged against the decision this court came to in *Abley v. Dale* was *urged most strenuously: [*543 and I think it is too much to ask us now to set aside a judgment which not only was well and maturely considered by us at the time, but which also has met with the approbation of very many other learned judges. I also think our decision in *Ex parte Dakins* is perfectly consistent with *Abley v. Dale*. In refusing the rule, I do not wish to be understood as conceding that a writ of habeas corpus could issue in such a case. I doubt whether the application should not be made to the judge of the court in which the order is made. In refusing the rule, however, on one ground, I do not by any means wish to sanction the notion that the application could be entertained at all.

MAULE, J.—I also am of opinion that the rule prayed should not be granted. As to whether a habeas corpus will lie, it is to be observed that the judge of the county court acts judicially. In deciding as he has done, he entertains a different notion of the law from that entertained by the applicant. Suppose there were a court of general appeal against decisions of the county courts,—like the court of appeal in Chancery,—nobody, I apprehend, could doubt that that court would be the proper one to apply to for a review of a decision of a county court judge, and not another court having jurisdiction to issue a habeas corpus. Without going into the matter more at large, it seems to me, upon the authority of *Abley v. Dale*, that there is no foundation whatever for this application.

The rest of the court concurring,

Rule refused.(a)

(a) An application was afterwards made to the Court of Exchequer for a habeas corpus; but that court likewise declined to interfere, holding themselves bound by *Abley v. Dale*, which they did not see sufficient reason to disturb: see *George v. Somers*, 25 *Law Times*, 165.

*SHEPHERD v. BAKER. June 4.

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Upon a motion to enter a suggestion to deprive the plaintiff of costs under the London Small Debts Act, 15 & 16 Vict. c. lxxvii., s. 119, it is enough if the affidavit shows with *reasonable certainty* that the plaintiff and defendant did not, at the time of the commencement of the action, dwell more than twenty miles apart.

And, it seems, the motion may be made at any time before the costs are taxed.

THIS was an action by the plaintiff as payee against the defendant as the maker of a promissory note for 35*l.* payable three months after date.

At the trial at the sittings in Middlesex after last term (on the 9th of May), a verdict was found for the plaintiff for 37*l.* 10*s.*, and on the

24th of May the plaintiff signed judgment and gave notice of taxation. On the 25th of May,

Henniker obtained a rule calling upon the plaintiff to show cause why a suggestion should not be entered upon the record, to deprive the plaintiff of costs, under the London Small Debts Act, 15 & 16 Vict. c. lxxvii., and why the final judgment signed should not, if necessary, be amended, by reducing the amount thereof to 37*l.* 10*s.*, the damages found at the trial. The affidavit upon which the rule was obtained, stated that the note upon which the action was brought was made by the defendant and delivered by him to the plaintiff at No. 5, Earl Street, Blackfriars, in the city of London, and that the plaintiff, at the time of the commencement of the action, resided and dwelt at the Isle of Dogs, in the county of Middlesex, and the defendant at No. 5, Earl Street aforesaid, "which two respective places are not more than seven miles apart."

Wood now showed cause.—The application is too late. The trial took place on the 9th of May; consequently, the plaintiff was entitled to sign judgment on the 21st; and the judgment was actually signed on the 24th; and this rule was not moved until the 25th. That *545] clearly was too late. [JERVIS, C. J.—Within what time was the defendant bound to come?] Before judgment signed, if there be a day in term to enable him to do so. In *Watchorn v. Cook*, 2 M. & Selw. 848, it was held to be too late for the defendant in the term after judgment signed and execution levied, to apply to enter a suggestion under a court of conscience act, to deprive the plaintiff of his costs, if he could have applied in the same term. The like was held in *Calvert v. Everard*, 5 M. & Selw. 510, where Bayley, J., says, "It seems to me that this application ought to have been made before final judgment; because, regularly, there should be a suggestion on the roll, which can only be made before judgment is entered." In *Hippesley v. Layng*, 4 B. & C. 863, 7 D. & R. 265 (E. C. L. R. vol. 16), it was held that, where a court of requests act enabled a defendant to deprive a plaintiff of his costs if he sued in a superior court, the defendant must make his application for that purpose promptly; and that, where a motion to enter a suggestion to deprive the plaintiff of costs, might have been made in Easter Term, but, instead of that, a negotiation respecting the costs was then entered into, and the motion was made in Trinity Term,—it was too late. Bayley, J., there says: "I think, that, in order to avail himself of the provisions of the statute in question, the party should have applied promptly to this court, and should not have entered into a negotiation respecting the costs. The cases of *Watchorn v. Cook* and *Calvert v. Everard* do not establish that a defendant is always in time *until* final judgment, they merely decided that he was clearly too late *after* judgment. In this case, the application might have been made in Easter Term, but, instead of that, a negotia-

tion was entered into, and an undertaking to pay the costs given, and then in Trinity Term the motion was made. I think that was too late, and that the defendant had waived the *advantage given him by the statute." [JERVIS, C. J.—This is the case of interlocutory judgment only. The statute limits no time for making the application.(a) I think it may be made at any time before the costs are taxed.(b)]

Then, the affidavit is insufficient, inasmuch as it does not distinctly state that the plaintiff and defendant do not dwell more than twenty miles apart. [JERVIS, C. J.—The affidavit states that the plaintiff, at the time of the *commencement of the action, resided and dwelt at the Isle of Dogs, in the county of Middlesex, and the defendant at No. 5, Earl Street, Blackfriars, in the city of London, which two respective places are not more than seven miles apart.] That is merely an allegation that the Isle of Dogs, and No. 5, Earl Street, Blackfriars, are not more than seven miles apart. That allegation would be satisfied if any part of the Isle of Dogs was within the distance mentioned. [JERVIS, C. J.—“Which two respective places,” means the place of the plaintiff’s residence in the Isle of Dogs, and the defendant’s residence in Earl Street. But, assuming that your reading is the correct one, how do we know that any part of the Isle of Dogs is more than seven miles distant from Earl Street, Blackfriars?] The affidavit should allege *with certainty and precision* that the plaintiff did not, at the time of the commencement of the action, dwell more than twenty miles from the defendant: *Johnson v. Ward*, 7 C. B. 868 (E. C. L. R. vol. 62).(c) This affidavit, to say the least of it, is very ambiguous.

JERVIS, C. J.—I think it appears upon this affidavit, with reasonable certainty, that the plaintiff and defendant did not, at the time of the

(a) The 118th section of the 15 & 16 Vict. c. lxxvii., enacts, “that all actions and proceedings which before the commencement of this act might have been brought in any of Her Majesty’s superior courts of record, *where the plaintiff dwelle more than twenty miles from the defendant*,—or where any officer of the court holden under the provisions of this act shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof,—may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed.”

And the 119th section enacts, “that, if any action shall be commenced, after the commencement of this act, in any of Her Majesty’s superior courts of record, for any cause, other than those lastly hereinbefore specified, for which a plaint might have been entered in the court holden under the provisions of this act, and a verdict shall be found for the plaintiff for a sum not more than 50*l.* if the said action is founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client; unless, in either case, the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court.”

(b) See *Read v. Blayney*, 8 C. B. 551 (E. C. L. R. vol. 65). There the plaintiff, on the 7th of June, recovered a verdict for 9*l.* 2*s.* 1*d.* in an action of contract, before the undersheriff: the writ of trial was returnable on the 8th: judgment was signed on the 11th: and it was held that the defendant was in time on the 11th of June to move to enter a suggestion, under the 9 & 10 Vict. c. 95, s. 129, to deprive the plaintiff of costs.

(c) See *Hayter v. Fish*, 6 C. B. 568 (E. C. L. R. vol. 60), where it was held to be sufficient if the affidavit made out a *prima facie* case.

commencement of the action, dwell more than twenty miles apart. It would be a mockery to doubt it. The rule to enter a suggestion must be made absolute.

The rest of the court concurring,

Rule absolute.

*548] *SKINNER and Others v. CARTER. May 23.

A rule to set aside proceedings to outlawry, for irregularity, was discharged *with costs*, on the ground that the affidavit did not purport to be made by an attorney duly authorized by the defendant. The irregularity being admitted, the defendant, although he had not paid the costs of the former motion, was allowed to make a second application for the same purpose,—but *only on payment of the costs of the second rule*.

WILLES, in Easter Term last, obtained a rule calling upon the plaintiffs to show cause why the writs of exigent and allocatur exigent issued in this cause, and the judgment of outlawry entered against the defendant, should not respectively be set aside for irregularity, with costs. The irregularities complained of, were, that the exigent was tested two days after the return of the *capias*, and that the allocatur exigent was tested of a day out of term. *Willes* stated that he had before obtained a similar rule, but that it was discharged, because it did not appear that the affidavit upon which it had been obtained was made by a party duly authorized as attorney for the defendant: 15 C. B. 472 (E. C. L. R. vol. 80).

Lush now showed cause.—The proceedings, no doubt, are irregular. But this is a second application. The former rule was discharged *with costs*. Those costs have not been paid; but the defendant has obtained his discharge under the insolvent debtors act, and has inserted them in his schedule. Under these circumstances, he ought not to be allowed to come again, at all events until he has paid those costs.

Willes, in support of his rule.—The court was informed when the motion was made, that it was a second application. [MAULE, J.—But not that the costs of the first remained unpaid.] The defendant could hardly be liable for those costs, the rule having been discharged on the ground that the application was not sanctioned by him: and, if he were liable, he is discharged from them under the insolvent act. There is
 *549] no such rule as that suggested about costs. [*Lush*.—This being a second application for the same matter, the defendant ought at all events to pay the costs of the present rule. MAULE, J.—He ought to pay the costs. Generally speaking, a party cannot come a second time to ask for the same thing.] He may where the proceeding is void. [MAULE, J.—How many times may he come?] It is enough to say that this man has not been here before: the former motion was met by a technical objection. [CRESSWELL, J.—The right to make a second application in respect of the same subject-matter, underwent much con-

sideration in this court in *Tilt v. Dickson*, 4 C. B. 736 (E. C. L. R. vol. 56). There, a judgment signed in an action brought by A. in the name of B., having been set aside by a judge's order, a rule nisi was obtained to rescind that order, on the ground that the summons upon which it was made had been improperly altered by the defendant's attorney. This rule,—which *by mistake* purported to have been moved on behalf of B.,—was discharged upon an affidavit of B., showing that the rule had been moved without any authority from him, and that the alteration in the summons had been made with his sanction: and it was held, that a second application for the same purpose might be made on behalf of A., the party really interested.]

JERVIS, C. J.—I think, under the circumstances, the rule ought to be made absolute on payment of the costs of this application.

The rest of the court concurring, Rule absolute accordingly.

*STEEL v. THE SOUTH-EASTERN RAILWAY COM- [*550
PANY. *May 23.*

Where work is done for a railway company under a contract (parol or otherwise), the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done.

THIS was an action upon the case for an injury to certain garden ground of the plaintiff, from the negligent manner of doing certain work by the alleged servants of the company.

The cause was tried before Maule, J., at the last Spring Assizes at Kingston. It appeared that the plaintiff was the occupier of about ten acres of garden ground adjoining the defendants' railway; and that certain workmen, in excavating a road for the purpose of making an embankment for the railway, cut into a drain or culvert, whereby the water was let out over the plaintiff's land, and his crops were damaged. The question was whether this was done by any person for whose acts the company were liable. There was evidence to show that the work was being done under the superintendence of one Phillips, the surveyor of the company, who furnished the plans: but one Eaves, the foreman of one Furness, a bricklayer, stated that the work was done by him and the men employed by him, under a contract between Furness and the company. No contract, however, was produced.

Upon his cross-examination, the witness said: "I had orders to go on from Mr. Phillips. He is the surveyor of the company. Mr. Phillips was the person who told me what to do. But I was the responsible person to determine in what manner that which Mr. Phillips directed me to do should be carried out."

It further appeared, that Phillips had directed Eaves to cut through

23 C. B. 736.

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only the half of a certain road at once; and that the flooding resulted *551] from the workmen having, *notwithstanding this direction, cut through the whole at once.

The learned judge thought there was nothing to go to the jury, and accordingly directed a nonsuit, reserving to the plaintiff leave to move to enter a verdict, with 130*l.* damages, if the court should be of opinion that under the circumstances the defendants were liable.

E. James, in Easter Term last, accordingly obtained a rule nisi.—He submitted, that, this not being the case of a sub-contract, as in *Knight v. Fox*, 5 Exch. 721,† and that class of cases, there was evidence of negligence on the part of the defendants, which ought to have been submitted to the jury.

Bramwell now showed cause.—The rule was moved improvidently. If the damage in question resulted from the negligence of the company's servants, no doubt the company would be liable. But here it appears that they employed a bricklayer to do the work. [JERVIS, C. J.—According to plans prepared by, and under the superintendence of, the company's surveyor.] If the doing the work according to the plans necessarily caused the mischief, the company would be responsible. But all that appeared, was, that the bricklayers received directions from Mr. Phillips as to what they were to do: the contractor's foreman expressly stated that he was the responsible person to determine how Phillips's orders were to be carried into execution. There was nothing to show that the work so far as it was done or concurred in by Phillips caused the plaintiff any injury. On the contrary, it distinctly appeared that the damage arose entirely from the improper manner in which Phillips's directions had been followed.

*552] *Hawkins*, in support of the rule.—The only question *is, whether there was any evidence to go to the jury to fix the company with liability. It was proved that the injury the plaintiff had sustained resulted from the manner in which the work in question was done. It was also proved that the work was being done under the immediate superintendence of Phillips, the company's surveyor. It is true, one of the witnesses stated that the work was being done under a written contract: but no contract was produced; and there was nothing to show what was the nature of the work to be done under the supposed contract. [MAULE, J.—It was assumed throughout at the trial that there was a contract.] It was *proved* that everything that had been done was done under the direction of the defendants' surveyor. [CRESSWELL, J.—It was proved that he directed the thing to be done, but not the improper manner of doing it.]

JERVIS, C. J.—I am of opinion that there was no evidence to go to the jury to fix the defendants in this case. It seems, from what my Brother Maule says, to have been taken for granted that Furness was employed by the company, under a contract, to do the work in question

under Phillips's directions. It appears that Phillips ordered that the road should not be cut through at once. If that direction had been obeyed by Furness's men, the damage complained of would not have occurred. There clearly was no case for the jury. Indeed, we should not have granted the rule, if we had not been informed that this was not a case of sub-contract.

MAULE, J.—I think it highly probable, from what I recollect of the case, that the injury done to the plaintiff's land was the result of natural causes. At all events, there was no evidence to show that the company, or any servants of the company, were to blame.

*CRESSWELL, J.—I also am of opinion that there was no evidence in this case that could properly have been left to the jury [*553 to show that the defendants or their servants had been guilty of any such negligence as to make them responsible. The person who did the work proved that he was employed by Furness. If it could have been shown that the plaintiff's land was flooded in consequence of something done by the orders of Mr. Phillips, the company's surveyor, it might have been said that that was the same as if Phillips had done it with his own hands, and then the company would have been responsible. But, it seems that the order given by Phillips was, to do the work in a different manner from that adopted by Furness's men. This was work done under a contract,—whether parol or otherwise, is immaterial,—and there is nothing to show negligence in any one for whose acts the company are responsible.

CROWDER, J.—I am of the same opinion. The only persons responsible for the acts complained of are Furness or Eaves. The circumstance of the work being done by Furness under a contract, negatives his being a servant of the company. The evidence of Eaves showed that he was acting quite independently of the company, though receiving orders from their surveyor. There clearly was no evidence to fix the defendants.

Rule discharged.

Overton v. Freeman, 73 Eng. Com. Law, 866; Peachey v. Rowland, 76 Eng. Com. Law, 181, and the note to the last-named case. An employee made a bargain with his employer to cut all the logs the employer had on certain lands, and to deliver them to the employer at a place named, the employer having no interest in the running of the logs, until they reached the point of delivery, nor to render any assistance pecuniary or otherwise in the cutting or running of the logs; it was held, that the employer was not liable for an injury occasioned by the negligence of the employee: Moore v. Sanborne, 2 Michigan, 519.

***554] *HAYNE and Another, Executors of CATHERINE LÆTITIA
HAWKINS, Deceased, v. ROBERTSON. May 8.**

Practice as to filing affidavits in answer to "new matter" under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 45.

Upon an application at Chambers, under the debtors and creditors arrangement act, 7 & 8 Vict. c. 70, s. 6, to discharge a party who has obtained an order for protection, from execution for a demand owing at the date of his petition, it is competent to the judge to receive affidavits to show that the order is invalid, by reason of the debt having been contracted by means of a breach of trust.

Upon a conflict of affidavits, on a motion to rescind the judge's order in such a case, the court directed an issue to try the question.

The court received affidavits in addition to those used before the judge, though containing facts within the knowledge of the applicant at the time the summons was taken out.

THIS was an action brought by the plaintiffs, as executors of one Catherine Lætitia Hawkins, deceased, against the defendant, who had been the attorney of Mrs. Hawkins, upon a promissory note, and for money had and received. The cause was tried before Cresswell, J., at the Hertford Summer Assizes, 1853, when a verdict was found for the plaintiff for the sum claimed. The defendant, having obtained a certificate under the debtors and creditors arrangement act, 7 & 8 Vict. c. 70, s. 6, and having afterwards been taken in execution for the damages and costs in this action, applied to a judge at Chambers for his discharge. This was opposed on behalf of the plaintiffs, on the ground that the debt had been contracted by means of a breach of trust, it being alleged that the money (110*l.*) had been deposited with the defendant for the purpose of investing it for the deceased; the defendant, on the other hand, swearing that it had been lent to him upon his own personal security. The learned judge before whom the summons was heard (Crowder, J.) thought the plaintiffs had failed to bring the case within the 6th section of the statute, and accordingly made an order for the defendant's discharge.

Quain, in Easter Term las, obtained a rule calling upon the defendant to show cause why the order of Crowder, J., should not be set aside.

***555] *Byles, Serjt.**, on a subsequent day, appeared to show cause against the rule, when

Quain asked leave to file affidavits in answer to those upon which cause was to be shown, pursuant to the 45th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

Byles, Serjt., objected that this could only be done when the court, on the argument of the rule, considered that there was new matter which required an answer. (a) Further, he submitted, that, this being a motion to review the decision of a judge at Chambers, it was not competent to plaintiffs to use any affidavits other than those which were before the judge at the time, containing matter which was within the

(a) See *Simpson v. Sadd*, 15 C. B. 757 (R. C. L. R. vol. 80); *Wood v. Cox*, *antè*, p. 494.

knowledge of the party appealing at the time the order was made: *Alexander v. Porter*, 1 Dowl. N. S. 299.

Quain referred to *Peterson v. Davis*, 6 C. B. 235 (E. C. L. R. vol. 60), to show that he was not precluded from using new affidavits in addition to those which had been used at Chambers.(a)

JERVIS, C. J.—We must hear the rule before we can decide upon the propriety of receiving affidavits in answer to the alleged new matter.

Byles, Serjt., then proceeded to show cause.—The court cannot under any state of circumstances interfere in this case. The question turns upon the construction *of the 7 & 8 Vict. c. 70, s. 6. By the 1st section of that act, a debtor (not being a trader subject to the bankrupt laws) unable to meet his engagements, and desirous of making an arrangement with his creditors, may present a petition to the court of bankruptcy, containing a proposal for payment or compromise, and praying for protection from arrest. Then follow provisions for the examination of the party, and for meetings of creditors, to be convened upon a certain notice, at the last of which meetings, if a given number of the creditors agree to an arrangement, the terms are to be embodied in a resolution or agreement, to be subject to the confirmation of the commissioner: but the 2d section provides for certain disqualifications, amongst others, that “the debts of such petitioning debtor shall not have been contracted by reason of any manner of fraud or breach of trust.” And the 6th section enacts, “that, within fifteen days next after the passing of such resolution or agreement, the same shall be submitted to the commissioner acting in the matter of the said petition, who, if he shall think the same reasonable, and proper to be executed under the direction of the said court, shall cause the same to be filed and entered of record therein, and shall grant to the said petitioning debtor a certificate of such filing, and shall from time to time endorse on such certificate his protection of such petitioning debtor from arrest; and such petitioning debtor shall be free from arrest at the suit of any person being a creditor at the date of his said petition, and having had such several notice or notices as aforesaid; and any officer arresting such petitioning debtor at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioning debtor, shall be liable to such penalty as is provided respecting bankrupts in the like case by the statutes now in force concerning bankrupts: provided, however, that *no such protection shall be valid* *in favour of any petitioning debtor who shall be proved to have been about to abscond beyond the jurisdiction of the said court of bankruptcy, or who has concealed or is concealing any part of his estate or effects, or against any creditor whose debt is not truly specified in the said petition, nor against any creditor whose debt has been con-

(a) *Peterson v. Davis* was a substantive application to the court, to enter a suggestion under the 10 & 11 Vict. c. lxxi., not a motion to rescind the judge's order.

tracted by reason of any manner of fraud or breach of trust." In the present case, the defendant, having been arrested for a debt due at the date of his petition under the above act, was brought before a judge, and, upon production of his protection, discharged. It is now said that the order for his protection was invalid as against the present plaintiffs, because the debt in respect of which they recovered their judgment against him was contracted by reason of a breach of trust. Assuming that to be so, the plaintiffs might have gone to the court of bankruptcy and got the order discharged: but, so long as it is a subsisting order, it protects the defendant. The question is, what is the proper tribunal to appeal to, in order to try the validity of the order. Surely it must be the commissioner of the court of bankruptcy, who has power to call before him all the parties interested, and not the superior courts, or a judge of one of the superior courts, who can only deal with the particular case before him. Some light may be thrown on the 6th section of the 7 & 8 Vict. c. 70, by the 12th section of the 5 & 6 Vict. c. 116, which shows who is the proper person to decide upon the validity of the protecting order in cases of insolvency. That section enacts "that it shall be lawful for any creditor or official assignee or other assignee, at any time after the final order shall have been made, to give one month's notice to the petitioner, either by personal service, or, if he cannot be found, by service at the place of his residence mentioned in his notice of petition, that such creditor intends to apply by motion to the said *558] commissioner, or, in case of *his death, resignation, or removal, to the commissioner appointed to succeed him, that the final order be rescinded as far as relates to the protection of the petitioner's person from process, and as far as relates to the effect of such order in bar of such suits and actions; and the said commissioner shall, upon hearing the matter of such motion, and any evidence in support of it, and what the petitioner has to allege against it, and any evidence against it, and upon examining the petitioner, if he shall desire to be examined or if the commissioner shall think fit, proceed to make such rescinding order as is hereinbefore mentioned, if he sees reason to believe that the petitioner had not before the making of the order sought to be rescinded made a full disclosure of his estate, effects, and debts, or had since the making of such order not given notice to the assignees of any property after acquired by him." That shows who is the proper person to decide upon the validity of the protecting order. [CRESSWELL, J.—The protection may still be valid as to other creditors.] By the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 201, the bankrupt is disentitled to his certificate, and such certificate, if allowed, "shall be void," if the bankrupt shall have lost within certain periods certain sums of money by gaming or stock-jobbing, &c. Under that act, it is not denied that it would be competent to a creditor to come before the court out of which the process issues, and say that the cer-

tificate is void and affords no protection to the bankrupt.(a) But, here, the act *says that the order shall be *invalid*, that is to say, is [*559 *voidable* by the proper tribunal. [CRESSWELL, J.—Does it not mean “not available?” JERVIS, C. J.—If it had been intended that the avoidance of the certificate should be the act of the bankrupt court, the statute would have contained provisions for avoiding it altogether.]

Assuming, then, that the validity of the protecting order may be discussed and disposed of before the judge, there is nothing either in the affidavits that were used at Chambers, or in the additional affidavits produced when this rule was obtained, to warrant the imputation of fraud upon the defendant, or to induce the court to say that the decision of the learned judge was wrong.

Quain, in support of the rule, commented upon the affidavits, and submitted that they disclosed such a degree of fraud on the defendant's part in his dealings with Mrs. Hawkins as to deprive him of the protection of the order under the 7 & 8 Vict. c. 70, s. 6.

JERVIS, C. J.—The question is a very serious one for the defendant; and I must confess I do not see my way clearly in the conflict of affidavits. I am very much disposed to decide against the defendant, unless he will consent to an issue to try the question.

After some discussion as to the form of the proposed issue, a rule was drawn up in the following form:—

“It is ordered, that the said parties do proceed to the trial of an issue at the sittings after Trinity Term next, to be holden at Westminster Hall, in the county of Middlesex, in which the said defendant shall be the plaintiff, and the said plaintiffs, as executors as aforesaid, shall be defendants, and in which the question to be tried shall be, whether, after the money was originally *advanced to the said defendant by Mrs. [*560 Hawkins, to be invested, it was agreed between the said Mrs. Hawkins and the said defendant that the same should be held on the said defendant's security only, as a debt due from him personally as for money lent or forborne to him: And it is further ordered that the costs of and occasioned by this application to the court do abide the event of the said trial: And, lastly, it is ordered that this rule be in the mean time enlarged.”(b)

(a) See *Clark v. Smith*, 3 C. B. 982 (E. C. L. R. vol. 54), where it was held, that, upon an application, at Chambers, under the 5 & 6 Vict. c. 122, s. 42, to discharge a bankrupt who has obtained his certificate, from execution for a demand provable under the fiat, it is competent to the judge to receive affidavits to show that the certificate is void, by reason of gaming, under s. 38, which is substantially the same as the 12 & 13 Vict. c. 106, s. 201.

(b) See the next case.

ROBERTSON v. HAYNE and Another, Executors of CATHERINE
LÆTITIA HAWKINS, Deceased. June 11.

In the case of an issue, it is no objection to an application to change the venue from Middlesex to Sussex, that the plaintiff is an attorney of the court.

The venue will be changed where justice and convenience manifestly require it.

THIS was an issue to try whether or not certain moneys were intrusted to the plaintiff for investment, or deposited with him upon his own personal security only as a debt: see the preceding case.

Quain now moved to change the venue from London to Sussex, upon an affidavit that the cause of action arose in Brighton and not elsewhere, and that the alleged agreement (if any) in this issue to be ascertained, was stated to have taken place in Brighton and not elsewhere; that all the defendants' witnesses, seven in number, resided at Brighton; that the plaintiff himself resided at Brighton; and that the expense would be greatly aggravated by a trial in Middlesex.

Byles, Serjt., showed cause in the first instance, upon an affidavit of the plaintiff stating that a trial at Lewes would be inconvenient and *561] expensive to him; that he *would thereby be deprived of the services of the counsel who was well acquainted with all the circumstances of the case; and that, as an attorney of the court, he claimed to have a right to retain the venue in Middlesex, where the venue was fixed, upon the motion, by the defendants' counsel.

Quain, in support of his rule, submitted that the preponderance of convenience was manifestly in favour of a trial at Lewes, and denied that there had been any special arrangement as to the place of trial when the issue was settled.

JERVIS, C. J.—I cannot say that the fixing the venue in Middlesex was any part of the bargain when we directed an issue, and therefore there is nothing to take this case out of the ordinary circumstances. I think the cause is a Brighton cause. The privilege of the attorney has no application to the case of an issue. It certainly would be more convenient to try at Lewes.

The rest of the court concurring,

Rule absolute.(a)

(a) The issue never was tried, the claim being compromised.

***BIGGS v. HANSELL. May 24.**

[*562]

Where an arbitrator to whom all matters in difference in a cause are referred, professes by his award to deal with the whole matters, it is no objection that he omits specifically to dispose of one of the matters in difference, if it necessarily appears from the whole of the award that that matter was substantially disposed of.

It is no ground for setting aside an award, that the arbitrator (a layman) has examined witnesses not upon oath or affirmation, if that mode of proceeding was not objected to at the time of their examination.

By a judge's order, dated the 21st of February last, and made by consent, all matters in difference in this cause (which arose out of a building contract) were referred to the arbitrament of one John Kilby, a builder. By this order, it was provided, amongst other things, that the costs of the reference and award should be paid in equal moieties by the plaintiff and defendant; that each party should appoint a surveyor, and that the arbitrator should give each surveyor four days' notice, who should then in company with the arbitrator compare the building with the contract, plan, and specification mentioned in the cause, and examine and make all necessary measurements of the work done by the plaintiff, and that each party should pay his own surveyor, and that the arbitrator, although attended by the surveyor of each party, should not be attended by the attorney of either party; that the arbitrator should be at liberty (if he should think fit) to examine the parties and their respective witnesses upon oath or affirmation, &c., &c.

By a subsequent order, of the 16th of March, one Evan Owen Williams was appointed arbitrator in lieu of Kilby, who had declined to act as arbitrator.

The action was brought to recover a balance of 173*l.* 19*s.* alleged to be due from the defendant to the plaintiff under the following building contract:—

“Memorandum of agreement made and entered into this 9th of August, 1853, between Edward Hansell, of St. Albans, in the county of Hertford, licensed victualler, of the one part, and Joseph Biggs, of the same place, builder, of the other part:

“The said Joseph Biggs hereby agrees and contracts *to dig [*563 out the foundation for, and to erect, complete, and finish, to the satisfaction of the said Edward Hansell, or any person or persons he shall think proper to appoint, in a neat, workmanlike, and substantial manner, with good and seasonable materials, and according to the plan, elevation, and specification, signed by the parties hereto, a certain building and premises intended as a Corn Exchange, on the site of certain premises lately occupied by Joseph Wood, cooper, situate in and facing Chequer Street and Market Place, in St. Albans aforesaid, and complete and finish such building and premises agreeably to the said plan, elevation, and specification, at or for the sum of 718*l.* 19*s.* And the said Edward Hansell agrees to pay to the said Joseph Biggs the

said sum of 718*l.* 19*s.* in manner following, that is to say, 100*l.* on the erection of the first floor, the further sum of 100*l.* on the erection of the second floor, the further sum of 100*l.* on the erection of the third floor, the further sum of 100*l.* when the roof of the said premises shall have been put on and completed, and the remainder of the said sum of 718*l.* 19*s.* within fourteen days after the final completion of the whole of the said building and works, provided the same are done to the satisfaction of any surveyor whom the said Edward Hansell shall appoint. And it is hereby further agreed between the said Edward Hansell and Joseph Biggs, that, in case any work, material, or thing shall be found to be omitted in the said plan or specification, or either of them, which ought, from the general tenor and effect of the said plan, elevation, and specification, respectively, to have been inserted therein, or without which the other works, matters, and things contracted to be done would be defective, then the said Joseph Biggs agrees to supply and make good such omission the same as if it had been fully specified in the plan *564] and specification, *without making any charge or demand whatsoever for the same,—it being the intent that the said building and premises shall under this contract be completed and finished in a proper manner for such sum of 718*l.* 19*s.* And the said Joseph Biggs hereby further agrees that the said Edward Hansell shall be at liberty to make any addition, subtraction, or alteration in the plan, or any alteration of the materials to be used, as he may think proper, and that such addition, subtraction, or alteration shall not vitiate or annul this contract, but that he shall be paid or allowed for the same, as the case may be. And the said Joseph Biggs hereby agrees to complete, fit for occupation, the part of the said premises intended as the Corn Exchange, on the first of November next, and the Assembly Room on the 24th of December next, and to finally complete the whole of the said buildings and premises, externally and internally, on the 9th of January next; and, in default of completion of such premises, or the above-mentioned portions thereof, to pay to the said Edward Hansell the sum of 10*s.* per day so long as the same shall remain incomplete as aforesaid after the dates or times above mentioned." In witness, &c.

The specification referred to in the contract, after minutely describing the works to be done, concluded as follows:—"The whole of the works herein described, and shown in the accompanying plans, with all and every other necessary for the full completion of the same, to be done by the contractor without extra charge, evasion, or litigation, and to be finished in a good, sound, and workmanlike manner, to the satisfaction of Mr. Hansell or the surveyor he may appoint to superintend the same. No alteration of additions or otherwise shall make void the contract, but shall be allowed for or deducted, as the case may be, at a *565] fair estimated *value; but no alteration will be allowed for, unless a written order is given for the same by Mr. Hansell or his surveyor."

The plaintiff, by his particulars, claimed, beyond the contract price of 718*l.* 19*s.*, a sum of 101*l.* 10*s.* for extras; and, after allowing 627*l.* for payments on account, and 19*l.* 10*s.* for goods supplied to him by the defendant, he went for a balance of 173*l.* 19*s.*

The arbitrator (Williams) made his award on the 5th of April last. After reciting the order of reference, and Kilby's refusal to act as arbitrator, and the subsequent judge's order, the award proceeded as follows:—

"Now, I the said Evan Owen Williams, having taken upon me the burthen of the said arbitrator, and having heard and duly considered all the allegations and evidence of the said respective parties of and concerning the said matters in difference as aforesaid, do make this my award in writing of and concerning the same, and do hereby award, order, and determine that the said Joseph Biggs had good cause of action against the said Edward Hansell, as stated in the proceedings in the said action: and I assess and award the damages to be paid by the said defendant to the said plaintiff in the said action (after giving the said defendant credit for the sums paid by him on account, and for his bill and claim against the plaintiff for corn and hay as stated and admitted in the particulars of the plaintiff's demand in the said action) at the sum of 122*l.* 6*s.* 5*d.*: And I further assess the costs of the said reference, and of this my award, at the sum of 10*l.* 14*s.*"

Pearson, in Easter Term last, obtained a rule nisi to set aside the award, on the grounds,—first, that the arbitrator held a meeting to proceed with the reference, without the defendant's having any notice thereof,—secondly, that, at such meeting, the arbitrator, in the *absence of the defendant and his legal adviser, proceeded with [566 the reference, and took evidence not upon oath,—thirdly, that objections to the plaintiff's claim existed which the arbitrator had not given effect to, inasmuch as the defendant had had no opportunity of bringing such objections before him, more particularly the want of the plaintiff's work and materials being certified to have been done to the satisfaction of the defendant's surveyor, and written orders having been given by the defendant for the extras, neither of which objections the defendant had ever waived or abandoned,—fourthly, that the defendant had never been heard at all before the arbitrator in the said reference, but that the said arbitrator had made his award without hearing the defendant at all, or giving him an opportunity of being heard,—fifthly, that the arbitrator had not awarded upon all matters in dispute, inasmuch as the award was silent as to the compensation of 70*l.* claimed by the defendant on account of the non-completion of the works pursuant to the terms of the agreement, and was also silent as to the damages occasioned by the work and materials not being performed and supplied according to the specification.

The affidavits upon which the rule was obtained, stated in substance,

that the arbitrator attended at the Corn Exchange, St. Albans, on the 26th of March last, for the purpose of comparing the building with the contract, plan, and specification, and measuring the work; that no notice or intimation was given to the defendant or his attorney by the said arbitrator of his intention to hold such meeting, but that, having heard that such meeting was to take place, he wrote to Mr. Holyoak, his surveyor, requesting him to inform the arbitrator that he should be prevented from attending on that day; that, notwithstanding that the defendant had received no notice from the arbitrator *567] of such meeting, and his *protest against its being held on the said 26th of March, the arbitrator proceeded to hold the meeting *in his absence and in the absence of any person on his behalf except Holyoak, who had no authority from him to act except so far as related exclusively to his business and profession of a surveyor*, and as set forth in the order of reference; that, on the said 26th of March, the defendant was sent for by the arbitrator, for the purpose of answering some question as to the works; that the defendant then informed the arbitrator that he should insist upon the plaintiff's producing written orders pursuant to the specification, signed by the plaintiff and himself, for any extra work which the plaintiff might claim to be allowed for, and that, pursuant to the contract between the plaintiff and himself, an allowance would have to be made to him for the time the premises remained incomplete after the respective times mentioned in the contract; that the arbitrator was occupied with the surveyors at the Corn Exchange from 11 o'clock in the morning till after 3 o'clock in the afternoon of the said 26th of March, and that the defendant was not aware that the arbitrator was upon that occasion going into any other matters of the reference than comparing the said Corn Exchange with the plan and specification, and examining and making all necessary measurements of the work done by the plaintiff; that the defendant had since been informed, and verily believed, that, on the said 26th of March, the arbitrator in his absence heard and examined the plaintiff, and also examined several witnesses on the plaintiff's behalf, and took much material evidence (*not upon oath*) upon matters other than the comparing the Corn Exchange with the specification, and the examination and measurement of the works, and that the defendant had no opportunity of cross-examining the plaintiff or his witnesses, or of objecting to their evidence; *568] that the plaintiff and his surveyor were with *the arbitrator the whole day, and that the surveyor of the plaintiff was allowed to advocate the cause of the plaintiff in other matters than those pertaining to his office of surveyor, and that he pronounced the contract mentioned in the particulars in this cause, so far as related to the allowance to be made to the defendant in case of non-completion, to be illegal, and not binding; that, after the said 26th of March, and without the knowledge or consent of the defendant, the written evidence of one

Manlove was forwarded by the plaintiff to and received by the arbitrator in some matter relating to the reference; that no orders in writing either of the defendant or his surveyor were produced by the plaintiff to the arbitrator at the meeting on the 26th of March, for the extra works claimed by the plaintiff, and that he had never waived the necessity of such orders being produced, and that the award had been made notwithstanding, giving the plaintiff the benefit of such extras; that the Corn Exchange was not completed on the 1st of November last, and that the Assembly Room was not completed on the 24th of December last, pursuant to the contract, and that the whole of the buildings and premises were not finally completed externally and internally on the 9th of January last, nor until one hundred and forty days afterwards, whereby 70*l.* became due to the defendant under the contract; that this had not been taken into consideration by the arbitrator; that the arbitrator never required the defendant to be examined as a witness, nor ever gave him an opportunity to do so, and that, if the defendant had known that the arbitrator was about to make his award without calling upon him to give such evidence, he would have offered evidence, but that the arbitrator made his award without giving him an opportunity of so doing; that several parts of the work had not been performed, and the materials had *not been supplied according to the specification, [*569 and that no compensation had been allowed by the arbitrator for such deductions; that the defendant's surveyor had never given any certificate of satisfaction of completion of the works pursuant to the terms of the agreement; and that the defendant had never waived the necessity of such certificate being given.

There was also an affidavit of the defendant's attorney negating the receipt by him of any notice of the meeting of the 26th of March; and an affidavit of Holyoak, the defendant's surveyor, stating, that, on the 3d of May, 1854, the plaintiff applied for his certificate of approval of the work, but, the work not having been completed to his satisfaction in many particulars, he declined to give such certificate, and, the said work not having since been completed by the plaintiff to his satisfaction, he had never given such certificate; that, on the 26th of March last, the arbitrator held a meeting at St. Albans, and the deponent attended in the capacity of surveyor to the defendant, but did not give evidence or proceed in matters beyond the scope of his authority as surveyor, relating to the comparison of the building mentioned in the order of reference, with the contract, plan, and specification, and the examination and necessary measurement of the work done by the plaintiff; that the plaintiff and his surveyor attended at such meeting, and that the arbitrator asked the plaintiff several questions respecting the contract between him and the defendant, the subject of this action, and witnesses on behalf of the plaintiff were sent for, but that *neither the examination of the plaintiff nor of the said witnesses was upon oath;*

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that the deponent never gave any orders to the plaintiff for any extra works to be done; that no orders for any such extra works by the defendant were produced at such meeting to the *arbitrator; *570] that the defendant never waived the necessity of such orders being produced, but insisted upon the plaintiff's producing orders for all works to be claimed as extras; that, on behalf of the defendant, the deponent drew the attention of the arbitrator to the terms of the contract, and pointed out to him the clause under which the defendant was entitled to compensation for the non-completion of the said work by the plaintiff within the time specified by the contract; and that he also drew the attention of the arbitrator to several works that were not done according to the plan and specification, the value of which were claimed as deductions in consequence of their not being performed according to such contract.

Lush now showed cause, upon affidavits of the plaintiff and of the arbitrator.—The former stated, that it was expressly arranged, when first it was consented to refer the cause, that neither his attorneys nor the attorney of the defendant should interfere or take any part whatever in or about the reference, and consequently his (the plaintiff's) attorneys had not done so; that, the meeting having been arranged between the plaintiff's surveyor, Bennett, and the arbitrator and Holyoak, for the 26th of March, the latter undertook to convey notice thereof to the defendant; that the meeting took place, and the plaintiff and defendant attended with their respective surveyors, Bennett and Holyoak, and the defendant on that occasion made no objection to the insufficiency of the notice, or the mode of conducting the inquiry; that, shortly after the arbitrator entered upon the subject of the reference, and was proceeding with the same, on the said 26th of March, the defendant left the meeting, and the arbitrator declined to proceed in his absence, and sent for him, whereupon the defendant returned a *571] *message to the effect that *his presence was not required, that Holyoak knew all about the matter, and that he should be satisfied with whatever he did*; that the arbitrator again sent for the defendant, who took part in the proceedings, in the course of which the question as to the allowance to the defendant for the non-completion of the said work specified by the contract, was fully discussed, and the plaintiff told the arbitrator, in the presence of the defendant, that he expressly arranged with him that he should not proceed with the works at the time on account of the weather, and that he had witnesses who could prove the same, whereupon the defendant again said that he should leave the matter entirely to Holyoak and the arbitrator; that, at that meeting, the arbitrator was not required to examine any one on oath, nor was any objection made to their not being examined on oath, nor to the mode of conducting the inquiry, nor did the defendant or Holyoak ever hint that they had or required any witness to be examined, nor

asked for any adjournment of the meeting, though they very well knew that the award was to be made by the 7th of April; that it was arranged at the said meeting, in the presence and with the express sanction of Holyoak, that the plaintiff should forward the defendant's written orders for the extra work done by him, which he did on or about the 28th of March; that every witness examined at the said meeting was examined in the presence of Holyoak or the defendant; and that, at such meeting, a discussion took place as to the putting up of some water fittings, and it was arranged, with the assent of Holyoak, that the account of Mr. Manlove against the plaintiff for the same should be transmitted to the arbitrator, which was done. The arbitrator also made an affidavit, in which he stated, amongst other things, that he understood Holyoak to be duly authorized to act for the defendant on the reference; that the defendant and *his surveyor had ample [*572 opportunity of adducing evidence before him, had they been so minded; that the subject of the allowance claimed by the defendant for the non-completion of the work at the time specified in the contract, was fully discussed in the defendant's presence; *that he was not asked to examine any person on oath, nor was any objection made to the mode of conducting the inquiry*, nor was any other appointment or adjournment suggested, and he believed that all parties acted upon the understanding that no more witnesses would be produced; and that he believed that every claim or objection by either party was brought and discussed before him, and received full consideration.

The objections to this award are completely answered. Although the defendant himself had no notice of the time of holding the meeting, his agent had, and he himself attended before the arbitrator, and so waived the objection. Then, as to the witnesses not having been examined upon oath, that clearly is no ground for setting aside the award, if no objection was made at the time of the examination: *Ridout v. Pye*, 2 Bos. & P. 91. Then it is said that the arbitrator has omitted to determine some of the matters referred to him. [CRESSWELL, J.—The objection rather is, that the arbitrator does not *say* that he has decided upon all the matters referred.] The award professes to be made "of and concerning the said matters in difference so referred as aforesaid." [CRESSWELL, J.—Mr. *Pearson* will contend that the arbitrator should have distinctly said that the defendant was not entitled to the 10s. a day he claimed.] The affidavits show distinctly that the arbitrator considered and intended to dispose of all that was in difference between the parties.

Pearson, in support of the rule.—Notice of the meeting to Holyoak was no notice at all. Holyoak was only *a surveyor, and did not [*573 represent the defendant any further than as the order of reference required, viz. for the purpose of going to the premises with the arbitrator, comparing the building with the contract, plan, and specification, and

examining and making the necessary measurements of the work done. [MAULE, J.—The order of reference does not so limit it. The attorneys are not to interfere,—a very sensible arrangement. But the affidavits filed on the part of the plaintiff show that the defendant deputed the whole of the affair to his surveyor.] The award shows, at all events, that the arbitrator has not awarded upon all the matters in difference referred to him. He merely states that the plaintiff “had good cause of action against the defendant as stated in the proceedings in the said action;” and he assesses the damages: but he says nothing about the defendant’s claim of 10s. per day. [MAULE, J.—He states what he allows to the plaintiff, and he does not say that he finds anything due to the defendant.] He ought, it is submitted, to have disposed unequivocally of the defendant’s claim.

Per Curiam.—We think the award is abundantly clear. The rule, therefore, will be discharged. Rule discharged, with costs.

*574] *In the Matter of the Acknowledgment of ——. June 12.

It is no objection to the filing of a certificate of acknowledgment under the 3 & 4 W. 4, c. 74, that the date of the certificate is written on an erasure.

MILWARD moved that the registrar of certificates of acknowledgments of married women, under the 3 & 4 W. 4, c. 74, might be at liberty to receive and file the certificate and affidavit in this matter, notwithstanding the date of the certificate was written on an erasure, without any explanation of the circumstances on the instrument itself. He submitted, that, inasmuch as the date of the acknowledgment would show that the date now appearing on the certificate was the true date, the erasure was immaterial.

Per Curiam.—The date on the other part of the document shows that the date here inserted is the true date. The certificate may therefore be filed. Fiat.(a)

(a) See *In re Mary Bingle*, 15 C. B. 449 (E. C. L. R. vol. 80), where the court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit,—there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn.

***TURNLEY v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY. June 12. [*575]**

Where a plaintiff is entitled to amend his declaration by changing the venue, as a matter of right, the court will not, at the instance of the defendant, impose terms.

THIS was an action brought by the plaintiff to recover damages from the London and North Western Railway Company for a personal injury sustained by the plaintiff through the alleged negligence of the servants of the company on their line. The venue was originally laid in London.

Byles, Serjt. (with whom was *Quain*), now moved for leave to change the venue to Surrey, which he submitted the plaintiff was entitled to do.

Bovill, on the part of the defendants, offered to consent to the venue being changed, upon the plaintiff's submitting himself to the inspection of two medical men of standing, to be selected by the defendants, in order that they might be able to give evidence as to the nature and extent of the injuries which he had sustained.

JERVIS, C. J.—We cannot impose terms upon the plaintiff. What he asks is matter of right.

The rest of the court concurring,

Rule absolute.

***LANE v. BAGSHAW. June 12. [*576]**

It is not enough to entitle a plaintiff to a mandamus to examine a witness in Australia, to show a mere probability that he can give useful evidence.

THE plaintiff in this action sought to recover from the defendant 448l. 15s. damages, for having been induced, in March, 1852, to purchase five hundred shares in The Lake Bathurst Australasian Gold Mining Company, by the false and fraudulent representations of the defendant, who was at that time chairman of the directors of the said company. The declaration, amongst other things, charged the defendant and other persons, at that time constituting the board of management, with having made false and fraudulent representations to the committee of the Stock Exchange, in order to procure the shares of The Lake Bathurst Australasian Gold Mining Company to be inserted in the official list of the said committee, and to induce the committee to appoint a settling day for the said shares.

The declaration was delivered on the 9th of February last: on the 19th, the defendant pleaded,—first, not guilty,—secondly, that the plaintiff was not induced for the cause alleged to make the purchase in the declaration mentioned,—thirdly, that the plaintiff did not purchase as in the declaration alleged: and, on the 18th of May, issue was joined,

and notice of trial given for the sittings in London after the present term.

On the 22d of May, a summons was taken out calling on the plaintiff to show cause why a mandamus should not be issued to the Chief Justice and the other judges of the supreme court of judicature at Melbourne, in Australia, for the examination of one James Boyle (*vivâ voce*) as a witness on behalf of the defendant, at Melbourne.

*577] The application was opposed, upon an affidavit which *stated, that Boyle was not a director of the company at the time when the said false and fraudulent representations were made by the defendant and other persons to the committee of the Stock Exchange, nor was Boyle a director at the time when the shares were first inserted in the official list; that the shares were first inserted in the official list in April, 1852, and that Boyle did not become a director of the company until the month of July following: that it was believed that the application for a mandamus to take the examination of Boyle, was made solely for delay, and that Boyle was not material for the defence, and could not in any way affect the plaintiff's right to recover in this action; and that a postponement of the trial would greatly prejudice the plaintiff.

Mr. Justice Williams, before whom the summons was heard, adjourned the hearing until the 30th of May, for further evidence in support of the application. Accordingly, the parties again attended before Williams, J., on the 30th of May, when a further affidavit of the defendant was produced, in which he stated, that, although, at this distance of time, and without referring to the books of the company, which were not in his possession or control, he could not remember the precise date when James Boyle, the proposed witness, became a director of the company, yet that he was actively concerned in the formation of it, and attended almost every meeting of the directors thereof from the commencement, and it was understood prior to the month of April, 1852, that he should become one of the directors in the place of Sir E. Belcher, who retired from the direction on or about the 16th of April, 1852, on his taking the command of the Arctic expedition, and that in fact Boyle did subsequently become a director in the place of the said Sir E. Belcher; that it was impossible for the defendant to specify the *578] precise questions and points to *which the evidence of Boyle would be directed, but that the object of the same was, to prove that he, the defendant, was no party whatever to any false or fraudulent representations as alleged in the declaration; that, in the months of November and December last, he employed persons for the express purpose of ascertaining where Boyle was, but without being able to do so; and that, although there were rumours that he had left England, the deponent had no knowledge whatever as to where he had gone, until the 17th instant (May), and he then for the first time ascertained that he had gone to Melbourne.

The learned judge being still dissatisfied, refused to make any order, but endorsed the summons as follows:—"Defendant to be at liberty to go to the court, with further affidavits on both sides."

Willes, accordingly, on a former day in this term, obtained a rule nisi.—A further affidavit of Bagshaw was produced; but the only addition to his former statements was the following,—“Since the making of my affidavit in this cause, of the 29th of May last, I have read the answer of the said James Boyle sworn in the cause of Barnard against myself and others, and from it I am strengthened in my conviction that the evidence of the said James Boyle will be of material assistance to me in this action, and will, as I verily believe, prove that I was no party to any such false and fraudulent representations as aforesaid.”

Lush showed cause, submitting, that the additional affidavit contained nothing to induce the court to come to any other conclusion than that to which the learned judge came when the parties were before him at Chambers; and that the whole of the affidavits taken together did not justify the court in imposing upon the plaintiff *the amount of [*579] delay and inconvenience which must result from the issuing a mandamus or a commission to examine witnesses at so distant a place, and with so little reasonable probability of their knowing anything about the transactions giving rise to the action.

Willes, in support of his rule.—The question is, whether the court is to receive affidavits on both sides, to try the materiality of the evidence of the proposed witness, before they will grant a mandamus to examine him; or whether it is not enough for the applicant to show a reasonable degree of probability that the evidence which the witness is expected to give will avail to establish his case or his defence.

JERVIS, C. J.—I do not at all think that this is a proper case for a mandamus.

CRESSWELL, J.—To entitle a party to a mandamus to examine witnesses in the colonies, it is not enough to aver or to suggest that it is probable that the witness proposed to be examined will give useful or material evidence. But, upon these affidavits, I think even that does not appear, but I think the contrary does.

CROWDER, J.—I must confess it does not seem to me upon these affidavits at all probable that Boyle would be a material and necessary witness.

Rule discharged.

*580] *In the Matter of a Plaintiff in the County Court of Lincolnshire, holden at Spalding, between BENJAMIN ADDENBROKE MOSSOP and THE GREAT NORTHERN RAILWAY COMPANY. *June 12.*

Quere, whether a judge of a county court, having once heard and disposed of an application for a new trial, can at a subsequent court re-hear the matter and grant a rule?

A PLAINT was levied in the county court of Lincolnshire, holden at Spalding, on the 14th of April last, by Benjamin Addenbroke Mossop against The Great Northern Railway Company, the particulars of the plaintiff's claim in which were as follows:—

“For that, you the defendants, being carriers for hire, were, on the 7th of March, 1855, intrusted with four beast of the plaintiff, to convey from Spalding to London, which beast you duly accepted and took in charge, and the carriage for which beast was duly paid to you; yet you neglected and refused to convey the said beast, and unlawfully placed the same in the common pinfold at Spalding, and the plaintiff was compelled to pay a certain sum of money in order to get the same released: and for that you unlawfully and improperly refused to convey certain beast of the plaintiff, and detained the same; whereby the plaintiff was seriously damaged: by reason whereof the plaintiff lost his market and sale of the said beast, and was put to great expense and inconvenience; to the plaintiff's damage of 10*l.*”

The summons came on to be tried at Spalding on the 25th of April last, before the judge of the county court, and a jury summoned at the plaintiff's instance, when the plaintiff appeared by attorney and the defendants by counsel, and a verdict was found for the defendants upon the evidence given by the plaintiff and his witnesses.

*581] After the jury had delivered their verdict, the *plaintiff's attorney applied for a new trial, when the judge asked if he would make the application then or at the next sitting of the court; whereupon the attorney signified his desire to make the application then, and immediately proceeded to state the grounds of his application, viz. that he was taken by surprise by the defendants' not producing a certain document necessary for establishing his case, and that he did not expect that the defendants would deny or dispute that a certain paper which the plaintiff was requested to sign at the time the beast were tendered to the company for conveyance by their railway, was a “risk note,” throwing all responsibility from the defendants as common carriers upon the plaintiff. It did not appear that the defendants had had any notice to produce this document, nor had it been asked for during the trial. The defendants' counsel having been heard in opposition to the application, and the plaintiff's attorney having replied, *the judge refused to grant a new trial*, and awarded 8*l.* 0*s.* 4*d.* for the de-

defendants' costs, which sum was paid by the plaintiff into court, and was received out of court by the defendants on the 28th of April.

At the sitting of the county court at Holbeach on the 26th of April, the judge told the plaintiff's attorney that he was dissatisfied with the verdict, and his own decision on the application for a new trial, and that, if he would renew the application at the next sitting of the court at Spalding, he (the judge) would grant the same. Accordingly, on the 5th of May, the defendants' attorney was served with a notice of the plaintiff's intention to apply at the next court, to be held on the 16th, for a new trial; this notice being accompanied by an affidavit of the plaintiff alleging surprise.

The defendants' attorney attended the court on the 16th of May, when the plaintiff's attorney renewed his application for a new trial, on the same grounds as were *urged before. The defendants' attorney opposed the application, on the ground that the judge had [*582 already decided the matter, and therefore could not, by the usage of the superior courts, entertain it again; and he urged that the plaintiff could not be said to have been taken by surprise on the trial, inasmuch as the case was decided entirely upon the plaintiff's own evidence. The judge made an order, "that the judgment in this case, and all subsequent proceedings thereon, be set aside, and a new trial had between the parties, on payment of defendants' costs of previous trial."

Byles, Serjt., on a former day in this term, upon an affidavit setting out the above facts, moved, on the part of the defendants, for a rule to show cause why a writ of prohibition should not issue to the judge of the county court, to prohibit him from proceeding to a new trial of the above plaint. An inferior court has no power, independently of some statutory provision, to grant a new trial. In the case of the county court, the power to grant a new trial rests upon the 89th section of the 9 & 10 Vict. c. 95, and No. 141 of the rules of practice framed pursuant to the 12 & 13 Vict. c. 101, s. 12. The 89th section of the 9 & 10 Vict. c. 95, enacts "that every order and judgment in any court holden under this act, except as herein provided, shall be final and conclusive between the parties; but the judge shall have power to nonsuit the plaintiff, in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or the defendant to the judgment of the court, and shall also in every case whatever have the power, if he shall think fit, to order a new trial to be had, upon such terms as he shall think reasonable, and in the mean time to stay the proceedings." And the rule of practice provides that "an application for a new trial, or to set aside proceedings, *may be made* *and determined on the day of hearing, if both parties are pre- [*583 sent,—or may be made at the first court held next after the expiration of twelve clear days from such day of hearing; and the party intending to make such application shall, seven clear days before the

holding of such court, deliver a notice in writing, signed by himself, his attorney, or agent, stating the grounds of his intended application, and also the court at which such application is proposed to be made, to the clerk, at his office, and give a similar notice to the opposite party, by serving the same personally on such party, or by leaving the same at his place of abode or business; and such notice shall not operate as a stay of proceedings, unless the judge shall otherwise order; and, if money be paid into court under any execution or order in the suit, the clerk shall retain the same, to abide the event of the application aforesaid; and, if no such application be made, the money shall, if required, be paid over to the party in whose favour the order was made, unless the judge shall otherwise order; and, if such application be not made at the court mentioned in the notice, no subsequent application for a new trial, or to set aside proceedings, shall be made, unless by leave of the judge, and on such terms as he shall think fit." [CROWDER, J.—Is it so clear that an inferior court cannot grant a new trial? I had the question argued before me at great length, at Bristol, when I was Recorder, and I held that I had not the power: but I thought it a matter by no means clearly settled.] Be that as it may, the jurisdiction of the county court in this respect is governed by the statute and the rule. Formerly, it was held that a judgment was always amendable in the same term,—the whole term being considered as one day. That is now altered by the new rule,—Hilary Term, 1853, r. 56,—which provides that "all judgments, whether interlocutory or *final, shall *584] be entered of record of the day of the month or year, whether in term or vacation, when signed, and shall not have relation to any other day."(a) It would not, therefore, be competent even to this court, after judgment once delivered, and entered of record, to turn round and pronounce a judgment the other way. Having once entertained the plaintiff's application for a new trial, and pronounced his decision upon it, the judge was functus officio. [CRESSWELL, J.—If he is not functus when his judgment has been pronounced, *and acted upon*, when is he functus? Can he now say that his *last* decision was wrong, and recall it?] If he may do this, what is to prevent the judge, or his successor, from doing it after a lapse of five years? [MAULE, J.—There are many reasons why inferior courts,—whose locality is fixed, and which are presided over by a single person,—should not have power to grant new trials, except in so far as they are expressly empowered by the statute. The words of the 89th section here are not expressly restrictive.] Where the legislature has intended to empower the judge to rescind or alter orders, it has done so in express terms; as in s. 100.(b)

(a) Previously provided for by Reg. 3 of Hilary Term, 4 W. 4.

(b) Which enacts "that it shall be lawful for the judge of any court before whom such summons shall be heard, if he shall think fit, whether or not he shall make any order for the committal of the defendant, to rescind or alter any order that shall have been previously made against any defendant so summoned before him, for the payment, by instalments or otherwise,

JERVIS, C. J.—We all think you are clearly entitled to a rule.

Montague Smith now showed cause, upon an affidavit *of the plaintiffs' attorney, who stated, that, at the hearing, the judge [*585 directed the jury to find for the defendant, because, there being no evidence of the contents of the document which the plaintiff was required to sign as a condition of the defendants' carrying the beast, there was nothing to show that it was not a reasonable one for him to sign; that he (the deponent) thereupon applied to the judge for a new trial on the ground that the plaintiff's evidence was sufficient to make out a *prima facie* case; that the judge distinctly stated that he would not decide the case then, but that, if any additional materials were laid before him, or any affidavit made in support of the application, and notice given to the other side, he would be prepared at the next court to hear the case, and told the deponent to take time to consider, which he accordingly did, and the application was left open.

JERVIS, C. J.—There is a direct conflict between the affidavits on the one side and on the other, as to what passed at the hearing as to moving for a new trial. We can only, therefore, direct the defendants to declare in prohibition. The question whether the judge of the county court has jurisdiction to re-hear an application for a new trial after it has been once exhausted by a decision, is one of considerable importance, and some difficulty. (b)

*The rest of the court concurring,

A rule was drawn up,—that the said company do declare [*586 in prohibition against the said Benjamin Addenbroke Mossop; and that the time for the said B. A. Mossop to show cause against this rule be enlarged until the court should further order. (b)

of any debt or damages recovered, and to make any further or other order, either for the payment of the whole of such debt or damages and costs forthwith, or by any instalments, or in any other manner, as such judge may think reasonable and just."

(a) See *Carter v. Smith*, 24 Law Journ. Q. B. 141, where it was held that the discretionary power to grant a new trial, given by the 9 & 10 Vict. c. 95, s. 89, is not interfered with by the 141st rule, which is merely a directory rule of practice; and therefore, that, notwithstanding the omission to give the seven days' notice required by such rule, the judge has jurisdiction to entertain an application for a new trial.

(b) By the 13 & 14 Vict. c. 61, s. 22, it is provided "that it shall be lawful for any judge of any of Her Majesty's superior courts of common law at Westminster, as well in term time as in vacation, to hear and determine applications for writs of prohibition directed to the judges of the said county courts, and to make such rules or orders for the issuing of such writs as might have been made by the court; and all such rules or orders so made by any such judge shall have the same force and effect as rules of court for such purposes now have; and such writs shall be issued by virtue of such rules or orders as well in term time as in vacation: Provided always, that any rule or order made by any such judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such rule or order."

EBENEZER DAVIES v. DANIEL PRATT. *June 11.*

Where an arbitrator, in making his award, described the defendant by a wrong christian name, the court refused to grant him a rule under the 1 & 2 Vict. c. 110, s. 18; but sent the award back to the arbitrator to be amended.

THIS cause and all matters in difference between the parties were referred to a barrister. In making his award (in favour of the defendant), the arbitrator by mistake called him "David" instead of "Daniel."

Willes, on a former day in this term, obtained a rule calling on the plaintiff to show cause why he should not pay the taxed costs awarded against him, pursuant to the 1 & 2 Vict. c. 110, s. 18; or why, if necessary, it should *not be referred back to the arbitrator to amend *587] his award by inserting therein the defendant's true name.

Bernard showed cause.—The award is not in the action referred: there is no such cause as "Ebenezer Davies v. David Pratt." This, therefore, is not a case in which the court would enforce the award by attachment,—*Lees v. Hartley*, 8 Dowl. P. C. 888,—and consequently not a case for an order for payment under the 1 & 2 Vict. c. 110, s. 18. In *Howett v. Clements*, 8 Scott, N. R. 851, 7 M. & G. 1044 (E. C. L. R. vol. 49), the court, under similar circumstances to those of the present case, declined to give effect to an award, but sent it back to the arbitrator for amendment.

JERVIS, C. J.—What answer does Mr. *Willes* propose to give to those cases?

Willes.—The identity of the party is apparent from circumstances shown upon the face of the award: and, moreover, the identity of the defendant with the person described in the award as "David Pratt," is sworn, and not denied.

JERVIS, C. J.—I think you cannot enforce the award in this way in its present state. It must go back to the arbitrator to be amended, as was done in *Howett v. Clements*.

Bernard.—When the rule was moved, the defendant was not in a condition to ask the court to refer the matter back to the arbitrator. An application for that purpose was refused in the last term, on the ground that the award was not before the court: ante, p. 162.

*588] JERVIS, C. J.—You have now taken the objection. *The matter is therefore properly before the court. It was a mere slip. It must go back.

The rest of the court concurring, Rule absolute accordingly.

Bernard asked for the costs of the rule.

Per Curiam.—No costs.

COLLINS and Others v. JOHNSON. June 12.

An action having been brought in the names of twelve persons who had formerly been shareholders and adventurers in a mine, upon instructions given to the attorney by one who alleged himself to be purser of the mine, and as such authorized to sue on behalf of the adventurers, three of the plaintiffs obtained judges' orders to strike out their names, on the ground that they had no interest in the matter, and that their names had been used without their knowledge or consent.

These orders were obtained on the 19th of September, 1854,—after the cause had been taken down for trial, and the defendant had consequently become entitled to costs of the day, on the withdrawal of the record.

On the 5th of May, 1855 (three days only before the end of Easter Term), the defendant obtained a rule calling upon the three plaintiffs whose names had been struck out to show cause why the orders for that purpose should not be rescinded, and upon the attorney to show cause why he should not pay the costs already incurred, and give security for the future costs:—

Held, that the application was too late for either purpose.

Whether the court would under any circumstances have interfered,—*quære?*

AN action was commenced in June, 1854, in the names of William Collins, Israel Bray Pellew, *Sigismund Rucker*, George Hopkins, Thomas Smith, Charles Addison, Henry Dennis, George Boucher, Daniel Mitchell Davidson, *John Drake*, *John Field*, and Cosmo William Gordon, against the defendant, Percival Norton Johnson, to recover the sum of 21*l.* 10*s.* for certain mining machinery and tackle alleged to have been supplied to a mine called The East Wheal Bedford, of which the defendant was alleged to be one of the adventurers and shareholders.

On the 3d of July, 1854, an order was made, by *consent, that Mr. John Collins, the plaintiffs' attorney, should forthwith declare [*589 in writing to the defendant's attorneys the profession, occupation, or quality, and places of abode, of the plaintiffs in this action. In pursuance of this order, Mr. Collins furnished the defendant's attorneys with the alleged names, residences, and additions of nine of the plaintiffs,—the other three, viz. Addison, Dennis, and Boucher, being described as "travelling abroad." Upon diligent inquiry at the several addresses given, it was found that all the parties had either absconded, or were unknown, dead, bankrupt, or worse,—with the exception of Rucker, Drake, and Field, who were persons of respectability, and whose descriptions and addresses had been correctly given.

The defendant having pleaded never indebted, issue was joined, and notice of trial given for the Bristol Summer Assizes, 1854; but, before the cause was called on for trial, the defendant's witnesses being in attendance, Collins, the plaintiffs' attorney, withdrew the record.

The defendant afterwards obtained a rule for costs of the day, which, on the 8th of September following, were taxed and allowed at 9*l.* 11*s.*

Immediately after the taxation of the above costs, summonses were taken out by Rucker, Drake, and Field, respectively, calling upon the other plaintiffs and their attorney, and the defendant and his attorney, to show cause why their respective names should not be struck out of the

proceedings in the cause, on the ground that their names had been used as plaintiffs without their authority or consent. The summonses were heard before Crowder, J., on the 19th of September, who made the following orders:—

“Upon hearing the attorneys or agents on both sides, and upon reading the affidavit of Sigismund Rucker and of Christopher Vickry Bridge-
*590] man, I do order that the *plaintiffs’ attorney or agent shall forth-
with declare in writing by whose authority this action has been brought, and the name, address, and description of the real plaintiff or plaintiffs, and that the name of Sigismund Rucker shall be struck out from such cause as one of the plaintiffs, on the ground that his name has been used as a plaintiff without his knowledge or consent; and that, in the mean time, all further proceedings in this action shall be stayed, as far as relates to or can in any wise affect the said Sigismund Rucker.”

The orders in the cases of Drake and Field were in the following form:—

“Upon hearing the attorneys or agents on both sides, and upon reading the affidavit of John Drake [John Field], I do order that the name of John Drake [John Field] be struck out of the proceedings in this cause, upon the ground that his name was originally introduced therein without his knowledge or consent; and that in the mean time all further proceedings be stayed.”

The affidavits of Rucker, Drake, and Field referred to in the above orders, stated that they never authorized any person or persons whomsoever to use their names as plaintiffs in the action, or in any way sanctioned the use of their names, nor had they any knowledge of the defendant, nor had they sold or delivered, or caused to be sold or delivered, any goods whatever to the defendant, themselves individually, or jointly with any other person; that they had no knowledge of the fact that their names were made use of as plaintiffs in this action until the eve of the Summer Assizes, 1854, when they heard from the defendant’s attorneys that a suit was pending in their names, whereupon they disclaimed all knowledge of the action; and that one of them (Rucker) attended at the Assizes at Bristol for the purpose of proving that the action was brought without his authority.

*591] The names of Rucker, Drake, and Field having thus *been struck out, the defendants caused further inquiries to be made after the other plaintiffs, with a view to the enforcing payment of the taxed costs of the day; but, not having succeeded in obtaining any satisfactory information concerning them, they, on the 3d of February, 1855, addressed a letter to Collins, the plaintiffs’ attorney, as follows:—

“Dear Sir,—On making inquiries respecting the plaintiffs who still remain upon the record, we find that the particulars of their residences which you furnished on the 3d of July last, do not contain accurate

information respecting them. We find that William Collins never permanently resided in Arlington Street, but only lodged there for a few nights whilst in London on business; that Pellew was dead before the action was brought; and that Hopkins was not known at the address given, at the time the particulars were furnished: and the addresses given of Smith, Addison, Dennis, and Boucher, are obviously so vague, if not fictitious, that it is useless to advert to them. We must, therefore, trouble you to furnish us with correct information of the addresses of the plaintiffs, or such of them as you are in communication with, so as to comply with the order which we obtained. And, in order to prevent any misunderstanding, we beg to give you notice, that, unless such information be furnished within a week, we shall apply to a judge to compel you to furnish it."

No answer being given to this letter, the defendant's attorney obtained another summons calling upon Collins to show cause why he should not declare in writing to the defendant's attorney within four days the true places of abode, professions, and occupations, or qualities of the remaining plaintiffs, specifying by name such of the plaintiffs as had, and such of them as had not, retained the said Collins to prosecute the said action, or authorized or adopted the same. This summons, which *was adjourned for a few days at the request of Collins, came on for hearing before Jervis, C. J., on the 10th [592 of March, when his Lordship made an order in the terms prayed. On the 20th of March, Collins delivered to the defendant's attorneys, as and for a compliance with the order, a memorandum in the following terms:—

"In the Common Pleas.

Between William Collins, Israel Bray Pellew, George Hopkins, Thomas Smith, Charles Addison, Henry Dennis, George Boucher, Daniel Mitchell Davidson, and Cosmo William Gordon, plaintiffs,

and

Percival Norton Johnson, defendant.

"In compliance with, and in obedience to, the order of the Right Hon. the Lord Chief Justice of the Common Pleas, dated the 10th of March instant, so far as I am able to comply with the same, I hereby declare that I am unable to state the places of abode, professions, occupations, or qualities of the above-named plaintiffs, or of any or either of them, any further than I have already stated the same in the particulars dated the 8d of July, 1854, and which was a true description of the then places of abode, professions, occupations, and qualities of the said plaintiffs, so far as I knew the same; and that, since the making of the said order, I have used my best endeavours, and made every inquiry in my power as to the places of abode, professions, occupations, and qualities of the said plaintiffs, and each of them, so as to

comply with the said order, but have been unable to obtain any such information; and that I believe that I was, and am, duly and legally retained and authorized by each of the above-named plaintiffs, except the above-named Israel Bray Pellew (who, since the commencement of this action, I have been informed, was deceased when this action was *593] brought), to *commence and prosecute this action, inasmuch as I was so retained and authorized by James Diamond, of Hewton, near Tavistock, in the county of Devon, mining agent, purser, &c., who informed me, and which information I believed and still believe to be true, that he had the authority of the above-named plaintiffs to commence this action for them and in their names.

(Signed)

“JOHN COLLINS,

Attorney for the above-named plaintiffs.”

Maynard, in Easter Term last, obtained a rule calling upon Rucker, Drake, and Field to show cause why the three several orders of the 19th of September last should not be respectively rescinded; and also calling upon John Collins, the plaintiffs' attorney, to show cause why those orders should not be rescinded,—or why he should not pay to the defendant, or his attorney, the amount of the said master's allocatur, and why all further proceedings in this cause should not be stayed until such security should be given and entered into by the said John Collins as should be approved of by one of the masters, for payment of the defendant's further costs, as well as those already incurred, or of such costs as he might thereafter be put to in and about his defence to this action.

The affidavits upon which the rule was moved, in addition to the above facts, stated, that the machinery for the price of which this action was brought had formerly been used at a mine in Cornwall called the Garras Mine, in which the several persons in whose name the action was brought had been shareholders, but, it was believed, had ceased to have any property or interest therein, and that the mine and machinery had become the sole property of one James Watts Diamond, long before the machinery in question was sent to the East Wheal Bedford; that *594] the machinery was sent to the *East Wheal Bedford by Diamond, who was himself a shareholder therein, without any orders from any one; that the machinery was never used at the last-mentioned mine; that the sending thereof to such last-mentioned mine constituted the alleged sale and delivery in respect of which the defendant was sued in this action; that two other actions had been previously brought by Diamond against the present defendant,—one in the name of one Northey, the other in the name of one Courtis,—for goods alleged to have been supplied to the East Wheal Bedford in November, 1851, and February, 1852, in both of which actions the defendant succeeded; on the ground, that, although he had at one time been an adventurer and shareholder in the last-mentioned mine, he had ceased to be so from

the year 1849, and long before any of the items forming the subject of those actions had been incurred; that those two actions were brought and prosecuted by Diamond for his own purposes, and at his own expense, or upon indemnities given by him to the respective plaintiffs therein; (a) that the deponent verily believed that the said John Collins had always been aware that the said James Watts Diamond had never at any time obtained the authority or consent of Rucker, Drake, and Field, or any of the plaintiffs in this action, to use their names as plaintiffs therein, and that the action was in fact wholly and at all times the unauthorized act and proceeding of Diamond alone, for his own benefit and purposes exclusively; that the deponent verily believed that the failure of the said two previous actions so brought in the names of other persons by Diamond against the defendant, and the grounds of such failure, were well known to the said John Collins as well as to Diamond at the time of the commencement of this action, and that they both well knew that he had the like defence to this action; that the present action was purely the action of Diamond, that he alone retained and employed Collins to bring it, and that Collins had no other client, and looked to no other person than Diamond for his costs therein; that Diamond alone, and no other person, was interested or concerned in the bringing and prosecuting the action, and that he brought and prosecuted the same in the names of Rucker, Drake, and Field, and the other plaintiffs therein, not only without the knowledge, authority, or consent of Rucker, Drake, and Field, as sworn by them as before stated, but also without the knowledge, authority, or consent of any or either of the other plaintiffs; and that the said plaintiffs did not, nor did any or either of them ever at any time in any manner authorize or consent to the use of their names as plaintiffs in the action, nor had they or either of them ever at any time adopted the action or in any manner sanctioned or recognised the use of their or any of their names as plaintiffs therein, but they had all the same grounds and reasons, and had the same right, to have their names as plaintiffs struck out of the said action, and to be discharged from their liability to the said costs thereinbefore mentioned, or any other costs incurred in the action, as Rucker, Drake, and Field had at the time when their names were so struck out as aforesaid; that this action was brought and prosecuted, and was known to Collins to be brought and prosecuted, by Diamond against the defendant maliciously and vexatiously, without any reasonable prospect of success, and for the purpose of annoying and harassing the defendant and putting him to further expense and trouble; that the said paper writing so delivered in pursuance of the order of Jervis, C. J., was a wholly illusory compliance with the said order, and of no use whatever towards enabling the defendant to obtain payment from the remaining plaintiffs in the said action, or any of them, of the taxed

(a) See *Johnson v. Diamond*, 24 Law Journ. Exch.

*596] costs of the day to which he was so entitled as *aforesaid*, and he would be left wholly without remedy for or power to recover the same, unless Collins were ordered to pay them.

The cases of *Hubbart v. Phillips*, 11 M. & W. 702,[†] and *Hoskins v. Phillips*, 16 Law Journ. Q. B. 389, were referred to.

Cause was shown against this rule upon the several affidavits of Diamond, Collins, Rucker, Drake, and Field.

Diamond, in his affidavit, stated, that he was appointed manager and purser to the Garras Mining Company in 1849, when the above-named plaintiffs,^(a) or some of them, were present and signed the cost-book of the said company making the said appointment, and that they continued to be shareholders or adventurers in the said mining company up to the time of the commencement of this action, and that the said appointment had never been cancelled or revoked, and he continued to act under the said appointment on behalf of the said company up to the time of the commencement of the action; that he never was proprietor or part-proprietor of, or an adventurer or shareholder in the Garras Mine, but had acted only as the manager and agent of the company; that he had for many years carried on the business of a mining-agent and purser, and had had the management of many mines in the counties of Devon and Cornwall, and was well acquainted with the customs of mining and mining companies; that it was the custom for mining-agents and pursers to act generally on behalf of the adventurers or company working the mine, at their discretion, for and on behalf of such adventurers, and to *597] bring actions for the recovery of debts *due* to the adventurers upon contracts made with such agents, and for such purpose to employ attorneys, &c.; that he had on several occasions so acted on behalf of the adventurers in the Garras Mine, and they had invariably ratified and recognised his acts therein; that, in pursuance of his general authority, he instructed Mr. Collins to commence an action in this court against one William Clyma for a debt due to the adventurers in the said mine, in the names of the said adventurers in the said mine at the time such debt was contracted, and that the debt and costs in the said action were paid, and deponent received the debt from Mr. Collins on account of the said adventurers; that, in 1852, he, on behalf of the adventurers in the Garras Mine, sold a horse-whim and other tackle and machinery to the purser of the East Wheal Bedford Mining Company; that the defendant was at that time a partner or shareholder in the said East Wheal Bedford Mining Company, as appeared by an affidavit of the then purser of the mine, made by him in the cause of *Courtis v. Johnson*, in the Court of Exchequer, wherein he deposed that the name of the said defendant was in the list of shareholders, and that he continued to be a shareholder at the time of that deponent's resignation of his office of purser to the mine in 1853; that, being unable to obtain pay-

(a) The names of Rucker, Drake, and Field were not in the title of the affidavits.

ment of the price of the said goods so sold and delivered to the East Wheal Bedford Mining Company, he, in pursuance of his general authority of agent of the Garras Mine, instructed Mr. Collins to commence this action in the names of the above-named plaintiffs and the said Rucker, Drake, and Field, to enforce the payment of the said debt against the said defendant, whom he believed to be a shareholder and adventurer in the East Wheal Bedford Mining Company, and able to pay the debt; that the cost-book of the said Garras Mine had never been kept by the deponent, but was in the custody of one Thomas, *the secretary, up to the time of his death, and that Thomas [*598 died some time before this action was brought, and the said cost-book then came to the possession of his executor, who went abroad before the commencement of this action, and still remained abroad, and, consequently, being unable to obtain access to the said cost-book, which contained the names and residences of the adventurers in the mine, when the order for the residences of the plaintiffs was obtained, the deponent was only able to furnish Collins with the residences of some of the plaintiffs, which he did accordingly; that the two former actions mentioned in the affidavits upon which the rule was obtained, were not brought for the deponent's benefit, and at his own expense, but were brought for the purpose of compelling the defendant to pay his equitable proportion of the liabilities of the mine; that Collins, the attorney for the plaintiffs in this action, was not concerned in either of the two former actions, and, to the best of the deponent's knowledge and belief, knew nothing of the circumstances; that the Garras Mine was conducted on the cost-book system, and there was no committee of management or board of directors, and the deponent was the sole manager and purser, but it was not his duty to keep the transfer or share-book, and he had no correct means of knowing from time to time who the shareholders were; and that he did not know of the death of Pellew at the time of the commencement of the action, but that he had been a shareholder in the said Garras Mine.

Collins, in his affidavit, stated, that he had known Diamond for the last four or five years, and believed him to be a respectable and responsible person; that he had on several occasions been employed by him in the way of his profession of an attorney and solicitor; that, in June, 1853, he was instructed by Diamond to commence an action in this court against one William Clyma at *the suit of the Garras Mine [*599 adventurers, for the recovery of a balance of account due from him to the said adventurers, and that the deponent accordingly, on the 25th of that month, commenced such action as attorney for the Garras Mine adventurers, and that the debt and costs in such action were paid by Clyma to him as such attorney, and he duly accounted for the same to Diamond as agent for the plaintiffs in that action; that, on that occasion, he was informed by Diamond, which information he believed

to be true, that the plaintiffs in the said action (a) were then adventurers in the Garras Mine, and that the money claimed in the said action was due to them as such adventurers, and that he Diamond was the agent of the mine, and had as such agent general authority from the adventurers therein to appoint an attorney to commence and prosecute actions in their behalf; that he was instructed by Diamond, on the 17th of June last, to commence this action at the suit and in the names of the plaintiffs and of Rucker, Drake, and Field, and that he received their names from Diamond, and had no other means of knowing them; that, on that occasion, he was informed by Diamond, and believed, that the action was for the recovery of the price and value of certain mining machinery and goods of the plaintiffs and Rucker, Drake, and Field, as adventurers in the said mine, sold and delivered by him Diamond, as agent of the said mine, and of the plaintiffs and Rucker, Drake, and Field, as adventurers therein, to the adventurers in another mine called East Wheel Bedford mine, of which the defendant was one, and that the plaintiffs and Rucker, Drake, and Field were the adventurers in the Garras Mine at the time the said goods were sold and delivered, and that the money sought to be recovered in this action was justly due to *600] *them from the defendant, and that he Diamond was still agent of the mine and of the said adventurers, and had authority to appoint and instruct the deponent as their attorney therein; that he never had any reason to believe or suspect, nor did he believe or suspect, that Diamond had no authority to instruct him to commence and prosecute the action in the names of the plaintiffs and of Rucker, Drake, and Field; that, upon being served with the summons upon which the order of the 3d of July, 1854, was made, the deponent applied to Diamond for information to enable him to comply therewith, and that Diamond furnished him with the residences and additions contained in the particulars delivered in obedience thereto, and that he delivered such particulars then and still believing that they contained a correct account of the then residences of the plaintiffs; that no objection was made thereto until the 3d of February last, when deponent received the letter set out in the affidavit on which this rule was moved; that the deponent accordingly applied to Diamond for further information, but was unable to obtain it; that, upon being served with the order of Jervis, C. J., of the 10th of March last, the deponent again applied to Diamond for such information as would enable him to comply therewith, and urgently requested him to give him such information, but was informed by him that he was wholly ignorant of the then addresses of the plaintiffs in the said order mentioned, and had no means of ascertaining the same, and that he thereupon delivered the particulars of the 19th of March as the only information he could furnish, and in so doing acted bonâ fide, and with an earnest desire to comply with and obey the said

(a) Their names did not appear in the affidavit.

order, and without collusion with any person; that, upon being served with the summonses to strike out the names of Rucker, Drake, and Field, he communicated the same to Diamond, and applied to him for instructions as to *opposing the same, and received from him [*601 directions not to oppose them; that, at the commencement of this action, and subsequently, the defendant's attorney was fully cognisant that the deponent was only instructed by Diamond; that the deponent attended at the last Bristol Assizes for the purpose of trying the cause, and that the record was withdrawn in consequence of the advice of counsel that the production of the cost-book (which the deponent could not then procure) would be necessary; that the deponent never was aware that Diamond had not the authority he assumed to have, but, on the contrary, when he was instructed to commence the action, he believed, and still did believe, that Diamond had, as the agent of the said mine, general authority from the said Rucker, Drake, and Field, and all the other plaintiffs (with the exception of Pellew, who was dead), to use their names as plaintiffs therein, they being the adventurers in the said mine, and that he verily believed that the action was brought and was prosecuted for the benefit of the said adventurers, and not for the benefit or for the purposes of Diamond; that neither the failure of the two former actions, nor the reasons or grounds of such failure, were known to the deponent at the commencement of this action; that the deponent believed himself to be retained and employed by Diamond as the agent of the persons in whose names the action was brought, and that he looked to the Garras Mine adventurers for his costs.

Rucker's affidavit stated, that he had formerly held shares in the Garras Mine, but that, in or prior to the month of May, 1852, he duly transferred and made over all his right and interest therein to Diamond, for his absolute use; that the deponent was informed, and believed, that Davidson, Gordon, Field, and Drake also transferred all their shares in the said mine to Diamond, who, by a letter of the 27th of May, 1852, *acknowledged the receipt of transfers to himself of 440 shares [*602 from Gordon, 440 shares from Davidson, 440 shares from Drake, 500 shares from Field, and 740 shares from the deponent; that Diamond thenceforth became the absolute owner of the said Garras Mine and all the machinery and tackle thereof; and that the deponent had not since that period had any property in the said mine, or in the machinery or tackle thereof, or in any other articles and things appurtenant to the said mine, or used in connexion therewith.

The affidavits of Drake and Field also respectively stated that they had in May, 1852, transferred their shares in the Garras Mine to Diamond, and had never since had any share or interest therein.

There were also affidavits to show that some of the plaintiffs had resided, or were known, at the addresses given pursuant to the order of

the 3d of July, 1854: and likewise affidavits of four persons,—George Marshall, William Huntley Fox, William Salmon Mansell, and Frederick Marshall,—experienced in mining affairs, stating that it was the constant practice for the purser of a mine to employ an attorney to bring actions in respect of debts due to the adventurers in the mine.

Byles, Serjt., and *V. Harcourt*, showed cause on behalf of Collins.—There is no pretence for calling upon Mr. Collins to pay these costs, or to give the required security. He had every reason to believe that Diamond, the person from whom he received his instructions, had due authority to put him in motion: and, indeed, it appears that all these plaintiffs, including Rucker, Drake, and Field, once were adventurers in the Garras Mine; and that it is the universal practice for the purser of a mine to act in the manner that Diamond has done. The question is not whether or not Diamond really had authority to employ Collins *603] on behalf of the *adventurers, but whether these parties have not placed him in such a situation that an attorney might reasonably believe he had such authority. The case of *Hutchinson v. Greenwood*, 24 Law Journ. Q. B. 2, shows that the defendant is not without remedy for costs, for that, under the circumstances, Diamond would be liable for them. It is true that was a case of ejectment: but the language of the judgment of Lord Campbell is general. “Those,” he says, “who come into court in another name, and abuse the process of the court, justly render themselves liable to pay costs as suitors.” The application is clearly too late. All the facts were known to the defendant, as well as to Rucker, Drake, and Field, many months before any steps were taken by either of them, or any complaint made of Diamond’s conduct.

The court here desired to hear the other alternative of the rule.

Bovill, for Rucker, and *L. Temple*, for Drake and Field.—Rucker, Drake, and Field clearly had no interest and took no part in the action. The only question, then, is, whether the mere fact of their names having been given by Diamond to Collins as parties interested in the Garras Mine, and their names having been used as plaintiffs in the action, entitles the defendant to have them restored. Formerly, the courts assumed that an attorney who brought an action had authority to use the plaintiff’s name, and the party was left to his remedy against the attorney if his name were used without his authority. But later cases have put the matter upon a more intelligible footing. In *Robson v. Eaton*, 1 T. R. 62, it was held, that, if A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.’s name, but without his authority, A. is notwithstanding obliged to pay B. again; and A.’s remedy is against the attorney, though such attorney conceived he was acting *604] *under the real authority of B. In *Doe d. Davies v. Eyton*, 3 B. & Ad. 785 (E. C. L. R. vol. 28), a party retained attorneys to prosecute an ejectment for D., and showed them, as his warrant for so

doing, a power of attorney purporting to be executed by D.: the attorneys, believing it genuine, took the cause to the assizes, but were obliged to withdraw the record: D., who had been made lessor of the plaintiff, and was abroad during the proceedings, disavowed them on his return, alleging the power of attorney to be a forgery: the court, on motion by D., ordered the attorneys to pay the costs, D. giving security to repay them the amount if they should succeed in an issue which the court directed, and in which the attorneys were to be plaintiffs and D. defendant, to try whether or not the ejectment was commenced or carried on with the privity of D. [JERVIS, C. J.—That was an ejectment, which has always been considered an excepted case.] The case was approved of by the Court of Exchequer in *Hubbart v. Phillips*, 13 M. & W. 702,† and the principle acted upon, though not a case of ejectment. The rule is well laid down by Rolfe, B., in *Bayley v. Buckland*, 1 Exch. 1,†—“The rule of law hitherto has generally been considered to be as stated in an anonymous case in *Salkeld*, 86, that ‘where an attorney takes upon himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him:’ but they qualified it in *Salkeld*, 88, stating that the judgment was regular, ‘but that, if the attorney be not responsible, or suspicious, they would set aside the judgment, for, otherwise, the defendant has no remedy, and any one may be undone by that means.’ It must be admitted that the reasoning is not very clear by which the court arrived at the conclusion, that, in so doing, they did justice to the defendant; for the non-responsibility or suspiciousness of the attorney is but a *vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame, and may not- [*605 withstanding be ruined. It is true, the plaintiff is equally blameless, but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and possible loss of costs. We are disposed to lay down a different rule, and to confine the liability of the defendant to cases in which the course of the proceedings has given him notice of the action being brought against him. When, therefore, a defendant has been served with process, and an attorney, without authority, appears for him, we think the court must proceed as if the attorney really had authority, because, in that case, the defendant, having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. There, the plaintiff is without blame, and the defendant is guilty of negligence. But, even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms, if he had a defence on the merits. If the attorney were solvent, it would not be unjust to leave the defendant to his remedy by summary application against him. On the other hand,

if the plaintiff, *without serving* the defendant, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so; and, upon the same principle on which we before proceeded, we must set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney, by summary proceedings. *The case of

*606] *Hubbart v. Phillips* is an authority for such an application." The court there repudiate the notion that the party is to be bound by the unauthorized act of one who assumes to be his attorney. [CRESSWELL, J.—No. They put it on the ground that one party has been guilty of negligence. Here, the defendant is at least as free from blame as the plaintiffs. The question is, who is to suffer.] There can be no reason why the burthen should be cast upon one whose name has been used without his authority. [CRESSWELL, J.—Can you show any case where an attorney *bonâ fide* using a man's name, in the belief that he had authority, has been called upon to pay costs?] In *Hoskins v. Phillips*, 16 Law Journ. Q. B. 339, it was held that an attorney, although he need not be instructed by a plaintiff personally, but may receive instructions from any one interested in the action, is liable to the defendant for costs, if it turns out that the plaintiff is a non-existing person. Wightman, J., there says,—“It is quite clear that there has been an attempt to practise a great fraud in this case, and that a non-existing person has been set up for plaintiff. It may be that Mr. B. (the plaintiff's attorney) is innocent in the transactions; but, at the same time, from the part which he has acted, there may be no other party to whom the defendant can look for his costs. Although an attorney is not bound to be instructed by the plaintiff himself, yet he ought to make proper inquiries, and he must take the consequence if it turns out that the plaintiff is a non-existing person. Here, the attorney, when asked for the plaintiff's address, made a statement which he should have ascertained to be correct. It may be that he has been deceived by Mr. Joseph, and that he may recover from him the amount of the costs when paid.” So, here, it may be that Mr. Collins has been deceived

*607] by Diamond; and, *if so, he may recover from him any costs he may be called upon to pay. The court, it is submitted, has general power to strike out of the record the name of a person that has been improperly placed there, and, as in *Doe d. Davies v. Eyton*, make the attorney pay the costs. When the summons to strike out the names of Rucker, Drake, and Field, was before the learned judge, Collins attended, but offered no opposition. The judge, therefore, could do no less than acquiesce in the prayer of the summons. He had authority

independently of the 34th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.(a)

There is, however, another and an insuperable objection to this rule. The orders for striking out the names of Rucker, Drake, and Field, were made on the 19th of September last; and the defendant, with full knowledge, or means of knowledge, of all the circumstances, has allowed two whole terms, and almost a third, to elapse *before [*608 he comes to make any complaint. It would be hard and unjust to these parties, who by the acquiescence of the defendant have gone free for a period of nearly eight months, to place them in jeopardy again, without any laches on their part. The granting of the orders was matter for the discretion of the judge, to be controlled by the court only in the event of the defendant's coming in a reasonable time. The 34th section of the 15 & 16 Vict. c. 76, gives large powers to the judge; but these orders he had authority to make independently of the statute.

Slade, Montague Smith, and Maynard, in support of the rule.—As to the time within which an application of this sort is to be made, there is no inflexible rule. It must, no doubt, be within a reasonable time, to be judged of by the surrounding circumstances,—expense incurred by the other side, or a subsequent step taken, or the like. [CRESSWELL, J.—In *Meredith v. Gittens*, 21 Law Journ. Q. B. 273, it is distinctly laid down by all the court that an application to review a decision of a judge at Chambers must be made in the course of the next term after his decision is pronounced. The like had previously been held by the Court of Exchequer in *Orchard v. Moxey*, 21 Law Journ. Exch. 79, n. In the former case, the order was made in Trinity Term, 1851, and the motion was in Hilary Term, 1852; and in the latter also the order was in Trinity Term, and the motion in the following Hilary Term. In the present case, the delay has been even greater; for, two clear terms, and the greater part of a third, have been suffered to elapse. It did not appear that any step had been taken in the two cases cited.] Those were cases in which the judge made an improper exercise of the discretion which he had; and therefore can

(a) Which enacts that "it shall and may be lawful for the court or a judge, at any time before the trial of any cause, to order that any person or persons not joined as plaintiff or plaintiffs in such cause, shall be so joined; or that any person or persons originally joined as plaintiff or plaintiffs, shall be struck out from such cause, if it shall appear to such court or judge that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person, or by writing under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out; and such amendment shall be made upon such terms, as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and, when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such cause."

have no application to a case where the judge had no power to make *an order at all. [CRESSWELL, J.—That is not quite so. In *609] those cases, the judges, conceiving, upon the authority of *Jones v. Harrison*, 6 Exch. 328,† 2 L. M. & P. 257, and *Latham v. Spedding*, 17 Q. B. 440 (E. C. L. R. vol. 79), that they had a discretion to allow or disallow costs under the county court act 13 & 14 Vict. c. 61, s. 13, had refused to allow them. But this court afterwards, in *Macdougall v. Paterson*, 11 C. B. 755 (E. C. L. R. vol. 73), held that the judges had no discretion: and the Court of Queen's Bench afterwards acquiesced in that view.] In *Griffin v. Bradley*, 6 C. B. 722 (E. C. L. R. vol. 60), the court do not affect to lay down any precise limit of time within which an application to rescind an order should be made; though the judgment of Wilde, C. J., would seem to point to twelve months as the reasonable limit. In July, 1854, the plaintiffs' attorney complies with the order for the names and descriptions of the several plaintiffs, in the manner mentioned in the affidavits. Inquiries were made, and, finding that Rucker, Drake, and Field were correctly described, and were responsible persons, the defendant was satisfied. The cause went down to trial at the Bristol Assizes, when the attorney for the plaintiffs withdrew the record,—probably because he found Rucker there subpoenaed as a witness on behalf of the defendant. The orders for removing the names of Rucker, Drake, and Field from the record, were not obtained until the 19th of September, which was after the defendant's costs of the day had been taxed and allowed. After the making of these orders, the defendant caused further inquiries to be made as to the remaining plaintiffs, and, not being able to obtain any satisfactory information, but having found that one of the plaintiffs had died before the commencement of the action, that two of them were absconding bankrupts, and the rest not known at the addresses given, the defendant made further application to the plaintiffs' attorney on the 3d *of February, and on the 10th of March obtained an order, *610] for more specific information, which the plaintiffs' attorney professed himself unable to comply with: and this motion was made in the next term. Under these circumstances, it is submitted, no laches can be imputed to the defendant, and that he is entitled to have this rule made absolute to restore the names of Rucker, Drake, and Field, or in the terms prayed as against Collins. [JERVIS, C. J.—You take your chance of getting your remedy from the other parties, and, failing that, you now wish to resort back to the three who were released eight months ago.] These parties knew before the cause went down to trial that their names were being used; and costs had become due to the defendant before they applied to have their names struck out. Under these circumstances, it is submitted, the judge had no power to make the orders. At common law, clearly he had none: and the 34th section of the Common Law Procedure Act, 1852, was never intended to apply to such a case, but merely to remedy defects arising from misjoinder or non-joinder

of parties. Before the statute, the court would not interfere to relieve a plaintiff whose name had been used, unless it appeared that the attorney was insolvent. In *Anonymous*, 1 Salk. 86, Lord Holt says: "The course of this court is, where an attorney takes upon him to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him." Again, *Anonymous*, 1 Salk. 88, where an attorney appeared, and judgment was entered against his (supposed) client, and he having no warrant of attorney, the question was, whether the court could set aside the judgment: and they said: "If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but if the attorney *be not responsible, or suspicious, we will set aside the judgment; for, otherwise, the defendant has no remedy, and any one [*611 may be undone by that means." [CROWDER, J.—That authority was cited, and disregarded, in *Doe d. Davies v. Eyton*, 3 B. & Ad. 785 (E. C. L. R. vol. 23). It would be manifestly unjust that a defendant should lose the security of a particular plaintiff. But, on the other hand, is it just that a plaintiff should suffer from having his name used without his knowledge or sanction?] This court adopted the authority of 1 Salk. 88, in *Stanhope v. Firmin*, 3 N. C. 301 (E. C. L. R. vol. 32), 4 Scott, 39.

Then, as to that part of the rule which calls upon Collins to pay costs, —justice manifestly requires that the rule should be made absolute to that extent, if the names of Rucker, Drake, and Field are not restored. This is the third action which has been brought against Johnson at the instigation of Diamond. [CRESSWELL, J.—Was Collins the attorney in those actions?] No. [CRESSWELL, J.—What, then, have they to do with the present question?] The circumstance of other actions having been brought, and their result, shows that there is no cause of action against the defendant at the suit of these plaintiffs, and that the whole proceeding is vexatious on the part of Diamond, and that this is substantially Diamond's action. [JERVIS, C. J.—You ask for an order against Collins, provided you fail upon the other branch of the rule. If my Brother Crowder's orders were right, what pretence is there for calling upon Collins? And, suppose we should think my Brother Crowder was wrong, but that you are precluded by your laches from coming to set the orders aside, how can we make your rule absolute against Collins?] There are many cases where the attorney has been compelled to pay costs, where he has taken proceedings without taking care to arm himself with the requisite authority. [CRESSWELL, J.—Must we not, before we visit *the attorney with costs, satisfy [*612 ourselves that he has wilfully abused the process of the court?] An attorney is bound, before he puts the law in motion, to see that he has competent authority to do so. The authorities to this effect are

distinct: *Gynn v. Kirby*, 1 Stra. 402 (recognised by Abbott, C. J., in *Johnson v. Birley*, 5 B. & Ald. 542 (E. C. L. R. vol. 7); *Doe d. Davies v. Eyton*, 3 B. & Ad. 785 (E. C. L. R. vol. 23); *Hammond v. Thorpe*, 1 C. M. & R. 64,† 4 Tyrwh. 838, 2 Dowl. P. C. 721; *Mudry v. Newman*, 1 C. M. & R. 402,† 4 Tyrwh. 1023; *Hubbart v. Phillips*, 18 M. & W. 702.† And the same rule is adopted in equity: *Allen v. Bone*, 4 Beavan, 493; *Crossley v. Crowther*, 21 Law Journ. Chan. 565,—the onus of showing that he *has* the plaintiff's authority resting upon the attorney: *Maries v. Maries*, 23 Law Journ. Chan. 154.

Upon the whole, therefore, it is submitted that the defendant is either entitled to have the names of Rucker, Drake, and Field restored, or to have the rule made absolute in the other alternative against Collins.

JERVIS, C. J.—Upon the best consideration that I am able to bring to this case, I think the defendant is precluded by the lapse of time which has taken place from objecting to the orders of my Brother Crowder for striking out the names of the three plaintiffs, Rucker, Drake, and Field. I cannot assent to the doctrine propounded by Mr. Maynard, that the rule as to lapse of time applies only to those cases where the judge at Chambers makes an order in the proper exercise of his discretion, and not to a case where he had no power or discretion to make an order at all. Here, the judge acted as if he had authority. I quite agree with the case of *Meredith v. Gittens*, 21 Law Journ. Q. B. 273, where Lord Campbell says “it is a very *wholesome* rule that all applications to review the decision of a judge at Chambers should be *613] made in the ensuing term;” my *Brother Erle adding that it is an “*established* rule.” Without, therefore, deciding whether the course adopted by my Brother Crowder was right or wrong, it is enough to say that the defendant's application to review his decision is too late.

Then, as to the other alternative of the rule,—it seems to me that it is open to two answers. If my Brother Crowder was wrong in making the orders to strike out the names of Rucker, Drake, and Field, there can be no reason why his mistake should be visited upon Collins. But I think the same answer may be given to this as to the other part of the rule, viz., that the defendant has precluded himself by his laches. He knew the ground of his complaint against Collins eight months ago. He had no right to wait, and take his chance of obtaining his costs from the plaintiffs who remained upon the record, and then, upon finding them insolvent, turn round upon Collins. Instead of acquiescing so long, he ought to have asserted his claim promptly. Parties who think proper to sleep upon their rights, if they have them, and only wake up at the eleventh hour, are not entitled to any favour at the hands of the court.

CRESSWELL, J.—I am of the same opinion. The case of *Meredith v.*

Gittens in the Queen's Bench, cannot be distinguished from the present. And that was preceded by a case in the Exchequer, of *Orchard v. Moxey*. In each of those cases, the delay of two terms was held to be a fatal objection to the party's right to call upon the court to review the decision,—treating the refusal of the judge to make an order for the allowance of the plaintiff's costs under the statute 18 & 14 Vict. c. 61, s. 18, as an order that he should not have them. Here, the defendant has allowed two whole terms, and almost a third, to elapse before coming to the court to complain *of the orders for striking out the names [*614 of Rucker, Drake, and Field. I think he must be taken to have waived any right he might have had to object to the learned judge's jurisdiction to make those orders. And, as he during all that time abstained from making any application against Collins, I think he ought now to be left to such remedy as he may have, other than the summary remedy sought by the latter branch of this rule.

The rest of the court concurring,

Rule discharged.

Byles, Serjt., asked that the rule might, as against Collins, be discharged without costs.

Per Curiam.—Under all the circumstances, we do not think the defendant should be called upon to pay costs.

Rule discharged, without costs.

JONES v. ORCHARD. June 11.

A. entered into a recognisance of bail for B. on the removal by certiorari of an indictment for conspiracy from the Central Criminal Court to the Queen's Bench. B. was convicted, and the recognisance was estreated *for the non-payment of the prosecutor's costs*:—Held, that A. might maintain an action against B. as upon an implied indemnity.

THIS was an action to recover 40*l.* 4*s.*, the amount of two bills of exchange, and the further sum of 40*l.* for money paid, and upon an account stated.

The cause was tried before Williams, J., at the first sitting at Westminster in this term. As to the counts upon the bills, there was no defence; as to the rest, the circumstances were as follows:—The defendant had been indicted at the Central Criminal Court, with *another, for a conspiracy. The indictment was removed to the [*615 Court of Queen's Bench, and, at the defendant's request, the plaintiff entered into a recognisance in the sum of 40*l.* in the following form:—

“England (to wit). Be it remembered, that, on the 24th day of December, in the 16th year of the reign of our sovereign lady, Victoria, by the grace of God of the united kingdom of Great Britain and Ireland, Queen, Defender of the Faith, William Henry Orchard, of, &c., John Jones, of, &c., and Bernard Lintott, of, &c., come before me, Sir

Charles Crompton, knight, one of Her Majesty's justices of the Court of Queen's Bench, and acknowledge to owe our said lady the Queen the several sums following, that is to say, the said William Henry Orchard the sum of 80*l.*, and the said John Jones and Bernard Lintott the sum of 40*l.* each, of lawful money of Great Britain, to be levied upon their several goods and chattels, lands and tenements, to Her Majesty's use; upon condition, that, if the said William Henry Orchard shall appear in Her Majesty's Court of Queen's Bench at Westminster on the 11th day of January next, and shall plead to all and singular indictments of whatsoever conspiracies whereof he and another stand indicted, and at his own proper costs and charges shall cause and procure the issue or issues that may be joined thereon to be tried in the same term, or at the sitting of Nisi Prius to be holden after the same term, in and for the county of Middlesex, if the said court shall not appoint any other time for the trial thereof, and, if the said court shall appoint any other time, then at such other time, and shall give due notice of such trial to the prosecutor or his attorney, and shall personally appear from day to day on the trial of the said indictment, and not depart until he shall be discharged by the court before whom such trial shall be had; and shall appear from day to day in the said Court of Queen's Bench at Westminster, and not depart until discharged *by such last-mentioned
*616] court; then this recognisance to be void, or else to remain in full force."

The defendant, having appeared and pleaded to the indictment in the Court of Queen's Bench, was tried and convicted in his absence; and the recognisance entered into by the present plaintiff having been estreated for non-payment by the defendant of the prosecutor's costs, the plaintiff now brought this action upon the indemnity implied by law.

The estreat was as follows:—"Because the said William Henry Orchard did not pay to the prosecutor his costs taxed, according to the course of the said court, upon an indictment against him and another for certain conspiracies and misdemeanours whereof they were convicted, as by the course and practice of the said court he ought to have done, but made default."

A verdict having been found for the plaintiff, damages 80*l.* 4*s.*,

G. Francis, on a former day in this term, obtained a rule nisi to reduce the damages by the sum of 40*l.*, and to enter the verdict for the defendant upon the indebitatus counts, on the ground that there was no implied indemnity on the defendant's part to repay the plaintiff the amount of the estreated recognisance. He submitted, that, although such an implied indemnity would arise in the case of bail in a civil action, it was contrary to public policy that it should exist in a criminal case. [CRESSWELL, J.—Was there any condition in the recogni-

sance for payment of costs?] None.(a) The object *of the recognisance is, to insure the personal attendance of the party [*617 at the trial. That object would be defeated in many cases, if this sort of implied indemnity existed. [CRESSWELL, J.—The estreat here is not for non-appearance of the accused, but for non-payment of the costs.] Payment of costs forms one part of the consideration: but, if the other part is contrary to public policy, the whole is void. The main object of the recognisance is, to procure the accused to appear and plead: the payment of costs is a mere incident to that main object. [CRESSWELL, J.—The main object of the recognisance, I should say, is, that the prosecutor shall not be put to costs by the removal of the indictment.]

A rule nisi having been granted,

Finlason showed cause.—The plaintiff having, at the request of the defendant, entered into a recognisance one object of which was that the defendant should pay the taxed costs incurred by the prosecutor, and having been compelled, in consequence of the defendant's [*618 *default, to pay the amount, is clearly entitled to maintain an action to recover it back. There is nothing illegal, nothing contrary to morality or public policy, in the transaction. In all cases where a man enters into a legal obligation to pay money for another, at his request, so soon as the payment is made, an implied promise arises on the part of the latter to repay it. [MAULE, J.—This is very like the case of *Lewis v. Campbell*, 8 C. B. 541 (E. C. L. R. vol. 65). There, A., being indebted to B., gave him an order upon C., his agent, who, upon its being presented, declined to pay it, but said he would set it off against a larger debt due from B. to one D., for whom C. was authorized to collect debts. C. accordingly credited D. with the amount mentioned in the order, and debited the account of D. with that amount; and D. afterwards gave A. a letter of indemnity against any proceedings B. might take against him in respect of his debt. B. having subsequently sued A., and obtained judgment against him (the action being defended in A.'s name by D.), A. paid the amount, to

(a) The recognisance under the statute 5 & 6 W. & M. c. 11, s. 2, 5 & 6 W. 4, c. 33, and the rule of Easter Term, 15 Vict. (1852),—as this was,—was not in terms conditioned for payment of costs: but the effect was the same; the bail were equally liable for the costs, though not mentioned: s. 3.

The recognisance now taken *does* contain a condition for payment of costs. See the 16 & 17 Vict. c. 30, s. 5, which, after reciting that "it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench," enacts, "that whenever any writ of certiorari to remove an indictment into the said court shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ, shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment; and, whenever any such writ of certiorari shall be awarded at the instance of the prosecutor, the said prosecutor shall enter into a recognisance (to be acknowledged in like manner as is now required in cases of writs of certiorari awarded at the instance of a defendant) with the condition following, that is to say, that the said prosecutor shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs incurred subsequent to such removal."

avoid an execution. It was held, that the circumstances raised an implied request by D. to A. to pay the money; and that the sum so paid was recoverable against D. in an action for money paid by A. to D.'s use. JERVIS, C. J.—It is clear, that, if this had been the case of a civil indemnity, an action for money paid would lie. But the question is, whether it will in a criminal case. At what time does the contract to indemnify arise?] At the time the plaintiff is compelled to pay the money: *Maxwell v. Jameson*, 2 B. & Ald. 51. [MAULE, J.—The defendant requests the plaintiff to enter into the recognisance; the plaintiff acts upon that request, and afterwards, in consequence of his so doing, becomes liable to pay a sum of money, and pays it. If this took place in a civil case, according to *Lewis v. Campbell* a contract on the defendant's part to repay the amount is implied.] In *Pawle v. Gunn*, *619] 4 N. C. *445 (E. C. L. R. vol. 33), 6 Scott, 286, the plaintiff having, at the defendant's request, entered into a contract for the purchase of Spanish bonds, to be delivered at a future day, and having afterwards paid the price,—it was held, that the defendant could not, in answer to an action for the money paid to his use, object that the contract was not in writing, as required by the statute of frauds, 29 Car. 2, c. 3, s. 17.(a) “I agree,” said Tindal, C. J., “that, in order to maintain an action for money paid to the defendant's use, the plaintiff must prove either that the money was paid by compulsion of law for the benefit of the defendant, or at his express request; and, in order to show a payment by compulsion of law, he must show such a contract as the law will enforce. But it is unnecessary to decide whether or not the contract between the plaintiff and Hitchcock was of that description, because this money was paid on what amounts of necessity to a request on the part of the defendant: and, when the employer has assented, as here, to a payment by his agent, no case has gone the length of saying he may repudiate such payment. If a person were to request another to pay money to a charity,—a payment which could not be enforced by law; could it be contended that an action would not lie against him for money paid?” [JERVIS, C. J.—By the recognisance you personally undertake that the prosecutor's costs shall be paid. Where is the implied contract to indemnify arising from the non-payment?] The recognisance is given under the 5 & 6 W. & M. c. 11, s. 2. [CRESSWELL, J.—The liability to costs arises on s. 3, which enacts, “that, if the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, that *620] then the said Court of King's Bench shall give *reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tythingman, churchwarden, or overseer of the poor, or any other civil officer,

(a) See *Knight v. Cambers*, 15 C. B. 562 (E. C. L. R. vol. 30), *Knight v. Fitch*, 15 C. B. 566.

who shall prosecute upon the account of any fact committed or done, that concerned him or them, as officer or officers, to prosecute or present, which costs shall be taxed according to the course of the said court, and that the prosecutor, for the recovery of such costs, shall, within ten days after demand made of the defendant, and refusal of payment, on oath, have an attachment granted against the defendant by the said court for such his contempt; *and that the said recognisance shall not be discharged till the costs so taxed shall be paid.*" In *The King v. Turner*, 3 B. & C. 160 (E. C. L. R. vol. 10), 4 D. & R. 816 (E. C. L. R. vol. 16), it was held, that, if a defendant remove an indictment into the Queen's Bench by certiorari, giving the usual recognisance under the above statute, and he be found guilty, and die before the day in banc, his bail are liable to pay the costs.] The bail are not called upon by the recognisance to pay costs. The plaintiff has done all that the recognisance required of him: he has procured Orchard to appear and plead to the indictment; and Orchard has been tried. [MAULE, J.—The bail are liable to pay the prosecutor's costs, although there is no undertaking to that effect in the recognisance: *The Queen v. Hawdon*, 1 Q. B. 464 (E. C. L. R. vol. 41), 1 Gale & D. 135, 9 Dowl. P. C. 1007. The Crown and the public have a right that the bail should be persons of ability and vigilance sufficient to secure the appearance and prevent the absconding of the delinquent. If they are indemnified, they stand in a different position as to their interest to that purpose than they otherwise would do. CRESSWELL, J.—Do you obtain sureties in addition to the party's own responsibility, if the bail are indemnified? JERVIS, C. J.—Assuming that an express promise to indemnify would be bad, can a promise to *indemnify be implied? As to the non-appearance of the defendant, there can, I apprehend, be little doubt: but a very different [*621 question may arise as to the costs; and here the recognisance was estreated only because Orchard failed to pay the costs.] As to the costs, the payment was clearly a payment for the benefit of the defendant, and there is no such illegality in the contract as to prevent an indemnity being implied by law. In *Bleaden v. Charles*, 7 Bingh. 246 (E. C. L. R. vol. 20), 5 M. & P. 14, H. deposited with the defendant as a security for goods sold, a bill accepted by the plaintiff, for which the plaintiff had received no value. H. afterwards paid for the goods, and asked for the restoration of the bill; but the defendant endorsed it for value to G., who sued the plaintiff, and recovered: and it was held, that the plaintiff might recover of the defendant the amount of the bill, in an action for money paid to the use of the defendant, but not the costs of the action by G. against the plaintiff. TINDAL, C. J., said: "It is clear, that, after Hay had paid the defendant for the goods, the endorsement of the bill by the defendant was wrongful, and the payment by the plaintiff, upon Henderson's suing him, compulsory. There has been, therefore, a com-

pulsory payment by the plaintiff induced by an act of the defendant,—an act of which he has had the full benefit. That is money paid to the defendant's use. If the defendant had sued the plaintiff on the bill, the circumstances under which it was deposited, and the payment by Hay, would have been a good answer to the action: it would be singular, therefore, if he could put the bill in circulation, and make the plaintiff pay the amount for his benefit, indirectly, without rendering himself liable to repayment." The obligation to pay costs stands clear of the objection founded on public policy.

*622] *G. Francis*, in support of his rule.—The question is *whether there can be any implied indemnity in such a case as this, or whether the policy of the law does not prevent such an implication from arising. The object of the recognisance is, to insure the production of the offender. If the indictment had remained in the court below, the prosecutor would have had his costs out of the consolidated fund. [CRESSWELL, J.—Until lately, the court had very little power over costs in cases of misdemeanour.(a) That, however, will not alter the construction of the recognisance.] The imposition of costs is one of the safeguards the law has thrown around prosecutors, with a view to check the delays and vexations attending the removal of indictments by certiorari. [CRESSWELL, J.—The liability of the bail is not limited to the amount mentioned in the recognisance: they are liable to the full taxed costs.] They are so: it was so held in *The King v. Teal*, 13 East, 4. It seems to be conceded, that, if the recognisance had been estreated for Orchard's non-appearance, no promise to indemnify could have been implied. The promise being founded upon several considerations, if one be bad, it is bad altogether. [JERVIS, C. J.—If it is illegal to indemnify against the consequences of the defendant's non-appearance, and legal to indemnify against the costs of the prosecution, why are we to imply a contract for both? Is the whole so tainted with illegality that a contract for that which is legal only cannot be implied? CRESSWELL, J.—Which part of the contract is illegal? What has the bail undertaken to do which he could not legally do? All the consideration moves from the bail. The question is, whether the promise founded upon the bail's accepting the responsibility is illegal. How do you show that Orchard promised to do anything illegal? Do you show that he has done more than promise to *623] indemnify *the plaintiff against the consequences of his being called upon to pay costs?] The contract is entire and indivisible; if any part of it be illegal, the whole is void. The test whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case: *Simpson v. Bloss*, 7 Taunt. 246 (E. C. L. R. vol. 2), 2 Marsh. 542 (E. C. L. R. vol. 4). Here, the plaintiff could not establish his case at *Nisi Prius* without putting in the recognisance. That being done,

(a) See 14 & 15 Vict. c. 19, s. 14.

it appears that the bail undertake that Orchard shall do certain things;—appear and plead to the indictment, to which the statute superadds a liability to the costs of the prosecution. Can the court imply an indemnity as to one part, and not as to the whole?

JERVIS, C. J.—The question is one of some nicety, and therefore we will take a little time to consider it. Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.

The court desired time to consider one point in this case. It was an action upon certain bills of exchange, with counts for money paid and upon an account stated. A verdict having been found for the plaintiff, a rule was obtained, pursuant to leave reserved at the trial, to enter a verdict for the defendant on the last two counts, and to reduce the damages by the sum of 40*l.*, on the ground that no implied indemnity arose out of the transaction giving rise to the action so far as related to those counts, inasmuch as it would be contrary to public policy. We are all of opinion that the rule should be discharged. We are relieved from considering whether, if the recognisance had been estreated for the non-appearance of Orchard, *the plaintiff would have had a [*624 good cause of action against him upon an implied contract of indemnity, because that question does not occur in this case. The action arises out of these circumstances:—Jones became bail for Orchard, who had been indicted at the Central Criminal Court for a conspiracy. The recognisance was conditioned that Orchard should appear in the Court of Queen's Bench on a given day, and plead to the indictment, and at his own proper costs and charges cause and procure the issue or issues that might be joined thereon to be tried, and should appear on the trial, and not depart until he should be discharged by the court. Orchard did duly appear and plead to the indictment, which was afterwards tried in his absence; and he was convicted. By force of the statute 5 & 6 W. & M. c. 11, s. 8, Orchard and his bail became liable for the costs of the prosecution. The costs were accordingly taxed, but not paid, and thereupon the recognisance was estreated, and Jones was compelled to pay the amount, 40*l.*; and he now brings this action upon an implied undertaking on the part of Orchard to indemnify him against the consequences of the obligation entered into by him on his behalf.

The rule was moved on the ground that a contract, in a criminal case, to indemnify the bail against the consequences of a default of the principal's appearance on the trial of the indictment, is contrary to public policy, and therefore that the law will not presume any such contract. It is unnecessary to decide that point on the present occasion, although we are inclined to think the objection well founded, and that such a contract would be contrary to public policy, inasmuch as it would be in effect giving the public the security of one person only, instead of two. But, as it is admitted that there is nothing illegal or

contrary to public policy in the other alternative, viz. the contract to indemnify the bail against *the prosecutor's costs, we need not
 *625] embarrass ourselves with the consideration of whether or not the law would infer an indemnity as to the rest. An express contract to indemnify against costs would not be illegal; and consequently there can be no reason why the law should not imply an indemnity under the circumstances.

It is said that this is an action of contract, and that the contract, being void in part, is void altogether. The obvious answer to that argument is this,—if it would be illegal to enter into such a contract as above supposed, the law will not infer that the parties have entered into an illegal contract: and, on the other hand, if the contract to indemnify the plaintiff against the payment of costs was legal, and the plaintiff in consequence of entering into the recognisance was obliged to pay these costs, the law will infer a contract to indemnify to that extent.

Upon the whole, we are of opinion that there is no illegality in the contract on which the plaintiff relies, and that he is entitled to recover. The rule, therefore, will be discharged. Rule discharged.

*626] *LEGGO v. YOUNG and Another. June 11.

By an order made under the compulsory power given by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 3, "a cause" was referred, nothing being said about costs. The umpire, by his award, "adjudged that the defendants should pay to the plaintiff 159l. 0s. 9d., in full of all demands in the above-mentioned action." The award was accompanied by a note from the umpire to the plaintiff, on a separate piece of paper, but not annexed to the award, in which the umpire expressed an opinion that the costs of the action, and of the reference and award, should be paid by the defendants, and that he would have so ordered, but that he could not do so, inasmuch as the order of reference was silent as to costs:—Held, that the parties were to be bound by the award, and that the accompanying note could not be looked at.

And *semble* that the arbitrator was right in supposing that the order gave him no power as to the costs—per Maule, J.

THIS action was brought to recover a sum of 776l. 13s. 9½d., balance of a builder's account of 1739l. 2s. 5½d. for repairs, of which the sum of 962l. 8s. 8d. had been paid.

The declaration,—for work and materials, money paid, interest, and money found due upon an account stated,—was delivered on the 25th of October, 1854; and, on the 2d of February, 1855, the following order was made by Cresswell, J.:—

"Upon hearing the attorneys or agents on both sides, and by consent, I do order that this cause be referred to John Tarring, of Bucklersbury, surveyor, and George Pownall, of Bedford Row, surveyor, who shall be at liberty, in case they differ, to appoint an umpire,—the

defendants having paid to the plaintiff 600*l.*, part of the money demanded."

The arbitrators differed, and accordingly the parties went before the umpire previously appointed by the arbitrators, viz. Thomas Little, of Northumberland Street, New Road, architect. The umpire, on the 28th of April, 1855, made his award, as follows:—

"Whereas, by an order made by the Hon. Sir C. Cresswell, one of the judges of her Majesty's Court of Common Pleas, and dated the 2d of February last, upon hearing the attorneys or agents on both sides, and by their consent, a certain cause then pending in the said court, between William Leggo, plaintiff, and Heathfield Young and John Harris, defendants, was referred to *John Tarring and George Pownall, surveyors, who should be at liberty, in case they differed, [*627 to appoint an umpire: And whereas the said John Tarring and George Pownall did differ upon and about the said reference, and were unable to make any award thereon, and did by writing under their hands, dated the 17th of February last, and endorsed upon the said order, appoint me, Thomas Little, of Northumberland Street, New Road, architect, as such umpire: Now, I, the said Thomas Little, having taken upon myself the charge of the said reference, and having heard, examined, and considered the allegations, witnesses, and evidence of the parties to the said cause concerning the premises, do make this my umpirage and award in writing of and concerning the premises, in manner following, that is to say, I do award and adjudge that the defendants shall pay to the plaintiff 159*l.* 0*s.* 9*d.* in full of all demands in the above-mentioned cause. In witness, &c."

The award was accompanied by the following letter from the umpire to the plaintiff:—

"36, Northumberland Street, New Road.

"April 28th, 1855.

"Leggo v. Young and Another.

"Mr. William Leggo.

"Sir,—I beg to state, as umpire in the above case, that the costs in this action, and of the reference and award, should be paid by the defendants; but, as the order of reference was silent as to such costs, I could not direct them to be paid, by my award. If the order of reference had empowered me to award the costs, I should certainly have awarded them to you, and directed them to be paid by the defendants in this action.

"THOMAS LITTLE, Umpire."

The master having declined to tax the plaintiff's costs upon this award, conceiving that the order gave him no authority to do so, the plaintiff took out a summons *calling on the defendants to show [*628 cause why they should not pay to the plaintiff the costs of the action, reference, and award, to be taxed; or why the order of reference should not be amended, by directing the said costs to abide the event,

or giving the arbitrators and umpire power to deal therewith as they or he should think fit; and why the cause should not be referred back to the arbitrators or umpire upon the question of costs; or why such other order should not be made as to the judge should seem fit.

The learned judge before whom the summons was heard declined to make any order thereon.

Willes now moved for a rule calling on the defendants to show cause why the master should not be at liberty to tax the plaintiff his costs of the cause, and of the reference and award, or why, if necessary, it should not be referred back to the arbitrators or umpire to consider and certify as to the said costs. The first question is, whether the arbitrator was right as to the costs of the cause. It is laid down in 2 Arch. Pr. 8th edit., by Chitty,—upon the authority of *Firth v. Robinson*, 1 B. & C. 277 (E. C. L. R. vol. 8), *Candler v. Fuller*, *Willes*, 62, *Rolle's Abridgement*, *Arbitrament* (K.), 13, *Whitehead v. Firth*, 12 East, 165, *Bell v. Beilson*, 2 Chitt. R. 157 (E. C. L. R. vol. 18), and *Bradley v. Tunstow*, 1 B. & P. 84,—that, “where a cause is referred, and the order of reference is silent as to costs, the arbitrator has power over the costs of the action, but not over the costs of the reference.” It is clear, therefore, that the umpire in this case has made a mistake in supposing that he could not deal with the costs of the cause. In *Firth v. Robinson*, the court said that “the costs in the cause being a matter in difference, the arbitrator had power over them, although not mentioned in the submission.” Further, the master should have taxed the costs under the Common Law Procedure Act, 1854, 17 & 18 *629] Vict. c. 125. The 3d section provides, that, “if it shall be made appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot be conveniently tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to the judge of any county court, upon such terms as to costs and otherwise as such court or judge shall think reasonable: and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.” The 7th section enacts that “the proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby, or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court

or judge's order." And the 8th section enacts, that, "in any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper." Under these provisions, the reference becomes as much part of the proceedings in the cause, as if the trial took place in the *ordinary way. [*630
[JERVIS, C. J.—It is plain the 3d section intended to give the judge discretion as to the costs of the order. By not exercising his discretion, he leaves the parties just as they were before. MAULE, J.—As to the costs of the cause, the umpire seems to have made a mistake, for which perhaps the matter ought to be remitted to him. But, as to the costs of the reference, we cannot interfere.]

Byles, Serjt., and *Horn*, showed cause in the first instance.—The 3d section of the 17 & 18 Viet. c. 125, gives the court or a judge power, without consent of the parties, to refer the matter in dispute to arbitration, "upon such terms as to costs and otherwise as such court or judge shall think reasonable." The order here is simply that "the cause be referred," and nothing more. And the umpire, by his award, orders "that the defendants shall pay to the plaintiff 15*l.* 0*s.* 9*d.*, in full of all demands in the above-mentioned cause." Afterwards, his power as umpire being exhausted, he addresses a note to the plaintiff, intimating, that, if the order of reference had empowered him to award the costs of the action, and of the reference and award, he should have directed them to be paid by the defendants. The plaintiff now seeks to obtain those costs. As to the costs of the cause, it is said, that, independently of the statute, where a cause is referred, and the order of reference is silent as to costs, the arbitrator has power over them: and for this *Firth v. Robinson*, 1 B. & C. 277 (E. C. L. R. vol. 8), is cited. The case, however, does not sustain that position: it was a reference of "the action and all matters in difference between the parties;" and all that the court held, was, that the costs in the cause being a matter in difference, the arbitrator had power over them. This is a reference before verdict, and therefore the statute of Gloucester (6 Ed. 1, [*631 c. 1) cannot apply. Then, the *compulsory power referring the cause, is, by the words of the statute, to state upon what terms the matter is to be referred. Here, the order is silent as to costs: the award also is silent,—unless, indeed, the adjudication of the umpire that the sum to be paid shall be "in full of all demands in the cause," may be taken to be a decision by which the arbitrator has expressly excluded costs. [MAULE, J.—The cause is referred: the umpire takes upon himself to dispose of all that is referred to him: and he says that the sum he awards is to be in full of *all demands* in the cause. Does not that mean that nothing more is to be paid?] The plaintiff clearly

is not entitled to costs either under the old law or under the statute. Then, there is no pretence for referring the matter back to the umpire. It cannot be said that the award is bad upon the face of it: and the court cannot look at the accompanying letter for the purpose of showing that the umpire has made a mistake. [MAULE, J.—The umpire does not say he made a mistake. If he had said that he had intended to award costs to the plaintiff, but by mistake had omitted to do so, that might have been a different thing.] His intention was completely carried into effect at the time he signed the award: and it would be extremely dangerous to allow an award to be influenced or impugned by subsequent statements of the arbitrator. The cases upon this subject are collected in Russell on Awards, 300 et seq. The result seems to show that the court will not at the present day receive statements or letters subsequently written by the arbitrator, to control his award: see *Gordon v. Mitchell*, 3 J. B. Moore, 241 (E. C. L. R. vol. 4), *Brown v. Nelson*, 13 M. & W. 897,† *Doe d. Oxenden v. Cropper*, 10 Ad. & E. 197 (E. C. L. R. vol. 37), 2 P. & D. 490,—which latter case virtually overrules *Kent v. Elstob*, 3 East, 18, where it had been held, that, if an arbitrator profess to decide upon the law, and he mistake it, the court *632] will set aside the *award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith.

Willes and *T. Chambers*, in support of the rule.—The question is, whether the plaintiff, who has succeeded in the action, is not entitled to have a decision as to the costs. The umpire has given no decision. The letter accompanying his award shows that the question of costs had been brought under his notice, and that he abstained from deciding it, upon a mistaken notion that he had no power over the costs, because the order was silent on the subject. That it is competent to the court to look at the letter, is clear from the case of *Kent v. Elstob*, 3 East, 18. *Grose, J.*, there says: "The award is clearly wrong, considering it to be founded upon the reasons stated by the arbitrator in the paper delivered with it (*which altogether must be taken as one instrument*); for, it appears from thence that he proceeded upon a ground which cannot be supported in our law." And *Lawrence, J.*, says: "It is not necessary that the arbitrator's reasons for making his award should appear upon the face of it, in order to enable the court to examine them." Here, there is no doubt what the arbitrator's reasons were, he having himself delivered them in writing to the parties, as the grounds of his decision, from whence it clearly appears that he has mistaken the law upon which he meant to proceed." And *Le Blanc, J.*, adds: "The paper in question was delivered, together with the award, by the arbitrator, as containing his reasons for coming to the conclusion which he did: we must therefore take them to be such, as much as if they were inserted in the award itself: and this could only have been

done for the purpose of enabling any party who was dissatisfied with the award, to take the opinion of the court upon the validity of those reasons." That *case has never been overruled. There is no- [*638 thing inconsistent with it in the decision of the Court of King's Bench in *Doe d. Oxenden v. Cropper*. The arbitrator having clearly made a mistake, the court has power, under the 8th section of the statute, to send the matter back to him for reconsideration. [JERVIS, C. J.—The 8th section will not apply, unless the 3d gives you the costs.] Assuming that the court cannot look at the umpire's letter, though accompanying the award, if he has omitted to decide as to the costs, his award is bad on that ground. [MAULE, J.—This is a reference of "the cause," not of "all matters in difference in the cause."] There is, in truth, no difference between the two expressions. [CROWDER, J.—So I should have thought. MAULE, J.—No power is by the order given to the arbitrator to put the cause to a legal end.] It is submitted that he has such power under the 3d section of the 17 & 18 Vict. c. 125. [MAULE, J.—If upon this award you think you are entitled to enter judgment for costs, do so.] The complaint is, that the arbitrator has given no decision as to costs. It is suggested on the other side, that the expression used by the arbitrator, "in full of all demands in the above-mentioned cause," involves a decision as to the costs. That, however, cannot be so: the "demand" is the sum for which the plaintiff brings his action: "debt or demand" does not include costs. In *Roe d. Wood v. Doe*, 2 T. R. 644, it was held that an arbitrator may award costs,^(a) without any express authority for that purpose.

JERVIS, C. J.—I am of opinion that there is no ground for disturbing the existing state of things in this case. *I think it is quite [*634 plain, that, if the principal point were before the court, the plaintiff could not succeed. I do not think that he could in any view be entitled to the costs of the reference, even if the costs of the cause were given. It is unnecessary to consider whether or not this order gives the arbitrator any power over the costs of the cause. If he had the power, he has determined it: and the parties are bound by his decision as well upon the law as upon the facts. As for the arbitrator's letter, I do not think we can take that into our consideration at all. It would be a very unsafe thing to place reliance upon such a communication for the purpose of contradicting or explaining the award, or the grounds upon which it is made. I think there should be no rule.

MAULE, J.—It lies at the very root of the motion, that the court can look at the arbitrator's letter for the purpose of seeing that he was wrong in point of law. The principal case upon this subject is *Kent v.*

(a) Costs of the cause; but not costs of the reference, because these latter are not a matter submitted, but one which arises subsequently to the time of the submission. *Candler v. Fuller*, Willes, 62.

Elstob, 3 East, 18, which is sought to be shaken by the subsequent case of *Doe d. Oxenden v. Cropper*, 10 Ad. & E. 197 (E. C. L. R. vol. 37), 2 P. & D. 490. But *Kent v. Elstob* was a very different case from this. There, the arbitrator delivered with his award a paper containing observations upon the evidence laid before him, and his reasons for making the award as he did. That, therefore, was a paper which substantially formed part of the award, and was intended so to do. Here, however, there is no document delivered with the award to both the parties; but merely a letter addressed to one of them, intimating the umpire's regret that he could not give him the costs. I do not think that is a sort of thing that should be taken notice of, or permitted to operate against the deliberate decision to which the umpire has come.

*635] We are rather more scrupulous now than the courts *formerly were as to these explanatory papers given out by arbitrators. One can easily conceive that an arbitrator might write to one of the parties, and express his regret that he cannot award him costs, without holding him to be pledging himself that he would have decided otherwise than he did, if he thought the authority under which he acted permitted him to do so. The award shows that the umpire did not intend to give the plaintiff the costs. If the letter accompanying it cannot be looked at, the award is unimpeachable. I am further of opinion,—without, however, professing to decide the matter,—that an order under the 3d section of the Common Law Procedure Act, 1854, which is silent as to costs, does not confer upon the arbitrator any power to deal with costs. If the parties meant to give him such power, they would have provided for it in the order. But I think I can see perfectly good reasons for not giving the arbitrators or umpire such a power in the present case. I agree with my Lord in thinking there should be no rule.

The rest of the court concurring,

Rule refused.(a)

(a) The order now in use at the judges' chambers contains the following provision as to costs: —“And I further order that the costs of this cause, to be taxed, shall abide the event of the award; and that the costs of the reference and award shall be in the discretion of the said arbitrator, who may direct to and by whom and in what manner the same shall be paid.”

***MEMORANDA.**

[*686]

In the Vacation after this Term, The Hon. Sir William Henry Maule resigned his office of one of the Judges of the Court of Common Pleas, and was shortly afterwards appointed a member of Her Majesty's Privy Council.

He was succeeded by James Shaw Willes, Esq., of the Inner Temple, who shortly after his appointment received the honour of knighthood.

Charles Shapland Whitmore, Esq., of the Inner Temple, William Overend, Esq., of Lincoln's Inn, Percival André Pickering, Esq., of the Inner Temple, James Plaisted Wilde, Esq., of the Inner Temple, and William Bovill, Esq., of the Middle Temple, were appointed Her Majesty's Counsel learned in the Law,—the former to take rank next after Henry Ridgard Bagshawe, Esq., and the others in their order.

CASES
 ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS
AND IN THE
EXCHEQUER CHAMBER,
IN
Trinity Vacation,
IN THE
 EIGHTEENTH YEAR OF THE REIGN OF VICTORIA. 1855.

WILDE and Another v. WATERS. June 25.

A ladder, a crane, and a bench were left by an outgoing tenant upon demised premises at the expiration of his term; the ladder and crane were fastened with nails or screws to the floor and to the joists above, in the usual way, and the bench was fixed to the wall:—

Held, that, in the absence of anything to show that they were put up for purposes of ornament or trade, trover would not lie for them.

TROVER for goods and chattels, to wit, a ladder, a crane, a bench, gas-fittings, a stall in a stable, and a rack for hay.

Pleas,—first, not guilty,—secondly, that the goods were not the property of the plaintiffs. Issue thereon.

The cause was tried before Maule, J., at the sittings in London in Easter Term last. It appeared that the plaintiffs had been tenants of the premises, in Shoreditch, which they quitted at Michaelmas, 1852, leaving thereon the articles mentioned in the declaration, which they had put up during their tenancy. Shortly after the defendant, the incoming tenant, had taken possession of the premises, a demand was made upon him for those goods, when he refused either to pay for them or to deliver them up to the plaintiffs. The manner in which the articles were fixed, was as follows:—The ladder and the crane were fastened with nails or screws to the floor at the bottom, and to the joists at the top, *the ladder being the only mode of access to the wareroom
 *688] or loft above, the bench was fixed to the wall, and the other

things were fastened in the usual way; but all might have been removed without injuring the freehold.

On the part of the defendant, it was objected that these were "fixtures," and that trover would not lie for fixtures.

The learned judge directed a verdict to be entered for the plaintiffs, for the agreed value of the articles,—reserving leave to the defendant to move to enter a nonsuit, if the court should be of opinion that they were under the circumstances fixtures in the sense of being irremovable by the tenant.

Cockle, in Easter Term, obtained a rule nisi accordingly.

Boyles, Serjt., and *Hance*, in Trinity Term, showed cause.—The question is, whether the articles enumerated in this declaration are fixtures, so as not to be the subject of an action of trover. As to the gas-fittings, the stall in the stable, and the rack, there may be some difficulty; but, as to the other articles, there can be none. The crane and the ladder were merely fixed with nails to the floor and to the joists above. The case of *Hellawell v. Eastwood*, 6 Exch. 295,† shows that these, though fixtures in one sense, are such as, being removable without injury to the freehold, might have been distrained for rent. In that case, the question was, whether cotton-spinning machines, which were fixed by means of screws, some into the wooden floor, some into lead which had been poured in a melted state into holes in stones, for the purpose of receiving the screws, were by law distrainable for the rent of the mill in which they were fixed. Parke, B., in delivering the judgment of the court, said: "At common law, things fixed to the *freehold, and which become part of it, could not be distrained, [*639 for two reasons. Lord Chief Baron Gilbert says, that, whatever is part of the freehold cannot be distrained, for, what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal; consequently, that cannot be a pledge which cannot be restored in statu quo to the owner. Besides, what is fixed to the freehold is part of the thing demised; and the nature of the distress is not to resume part of the thing itself for the rent, but only the inducta et illata upon the soil or house: Gilbert on Distresses, pp. 34, 48: and, on the sole ground that they were parcel of the freehold *by construction of law*, keys, windows, and charters concerning the realty, were not liable to be distrained. It was, besides, a rule at the common law, that things which could not be restored in the same plight and condition could not be distrained for rent: Co. Litt. 47; Gilbert on Distresses, 34, 48. We have, therefore, to decide whether these machines fall within either of these categories, for, otherwise they are not protected. They do not fall within the latter; for, upon being taken to the pound, they might be brought back without damage to themselves. They are not of a perishable nature, and would not suffer by a careful removal. If it were necessary to take some to pieces, in order to remove them,

that circumstance would make no difference; for, that might occur with chattels with respect to which there is no question, as, for instance, post-beds; they could not be carried to the pound without being first taken to pieces; and the distrainee would have no reason to complain that they were restored to him in the disjointed state at the pound, where he must attend to receive them. It would save him the trouble of taking the bedsteads to pieces again, in order to replace them, if they had been restored entire. Nor does it make any difference that

*640] the distrainee would be *obliged to incur the expense of refixing the machinery. Precisely the same objection might be made to the distress of any article which it required expense to carry back from the pound, and to restore to its former position. The distrainee, at common law, must be at the trouble and expense of taking back his goods from the pound. This practical inconvenience is now obviated by the power of impounding on the premises. The only question, therefore, is, whether the machines when fixed were parcel of the freehold; and this is a question of fact, depending on the circumstances of each case, and principally on two considerations,—first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *intégrè, salvè, et commodè*, or not, without injury to itself or the fabric of the building,—secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causâ*, or in that of the Year Book, 20 H. 7, fo. 13, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*. Now, in considering this case, we cannot doubt that the machines never became part of the freehold. *They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels.* They never were a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason

*641] *why they and similar articles have been held, in different cases, to be removable. The machines would have passed to the executor: per Lord Lyndhurst, C. B., *Trappes v. Harter*, 2 C. & M. 177,† 3 Tyrwh. 604. They would not have passed by a conveyance or devise of the mill. They never ceased to have the character of movable chattels, and were therefore liable to the defendant's distress." So, here, the articles in question, viz. the ladder and the crane, are merely fixed at the top and bottom for the purpose of keeping them steady for

use as chattels. [JERVIS, C. J.—What right had the outgoing tenants to seek to impose upon the incoming tenant the duty of taking down these fixtures for the purpose of delivering them to them? And, was he bound to let them come in to take them?] The defendant's refusal was not put upon either of those grounds. [CROWDER, J., referred to *Colegrave v. Dias Santos*, 2 B. & C. 76 (E. C. L. R. vol. 9), 8 D. & R. 255. There, the owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: and it was held that they passed by the conveyance of the freehold, and that, even if they did not, the vendor, after giving up the possession, could not maintain trover for them.] A simple demand and refusal is evidence to go to the jury. [JERVIS, C. J.—Does a demand and refusal alter the character of the article?] These articles never were so fixed to the premises as to cease to have the character of movable chattels. [MAULE, J.—Applying an adequate force, everything is removable: it is in all cases but a question of degree.] It is clear that these things would be distrainable for rent.^(a) In *Pitt v. Shew*, 4 B. & *Ald. 206 (E. C. L. R. vol. 6), it was held, that the value of fixtures might [*642 be recovered on a declaration in trespass for taking "goods, chattels, and effects." [MAULE, J.—They would aptly come under the word "effects."]] *Davies v. Jones*, 2 B. & Ald. 165, is precisely in point. It was an action of trover for five jibs. The case stated that, by lease of the 31st of May, 1755, W. demised for sixty-one years to P. certain premises therein described, comprising among other buildings a warehouse, and the lessee covenanted to repair the same with all erections and buildings which during the term should be erected upon the premises, and to deliver the same to the lessor at the end of the term. The interest of the lessee was afterwards assigned to the plaintiffs, and, the premises having during the term been destroyed by fire, the plaintiffs rebuilt them, and on that occasion put up the five jibs in question. Certain caps and steps of timber were fixed into the buildings, and the jibs were placed in these caps and steps, and were the uprights that turned round the work in the caps and steps. *They were fastened by pins above and below, and might be taken in and out of the caps or steps, without injuring either them or the building; but they could not be removed without being a little injured themselves. Jibs of this description, unless scheduled in the leases of warehouses, are usually valued between outgoing and incoming tenants.* The plaintiffs continued in possession of the warehouse and of the jibs, until the expiration of their term in 1816, when they delivered up possession of the premises to their landlord, without prejudice to their right to remove these jibs, and other tenants'

(a) Whether they would be distrainable, while in the possession of Waters, for rent due from Wilde,—*quare?*

fixtures. The premises were afterwards, in May, 1816, demised to the defendants: and the question was whether or not the defendants were liable in trover for not delivering up these five jibs to the plaintiffs as outgoing tenants. In giving judgment, Abbott, C. J., said: "If *643] *these jibs are to be considered as personal chattels, the plaintiffs did not lose their property in them, by leaving them on the premises in the manner mentioned, in the case. And, supposing the property to have remained in the plaintiffs, so that they might lawfully demand and reclaim them from their landlord, they may also lawfully demand and reclaim them from the present defendants, who claim title under the landlord, and can have no title if the landlord had no title to confer. On the other hand, if the jibs are to be considered as annexed to and parcel of the freehold, then, admitting that the plaintiffs might have removed them during the term, as being erections for the benefit of trade, yet they could not after the term maintain trover for them; because the action of trover is maintainable in respect of personal chattels only. Upon the matters stated, we think that the proper conclusion of fact is, that these things were (at least, as between landlord and tenant, and persons claiming under either of them) personal chattels. The mode by which they might be removed is not very clearly explained; but it is expressly found that they might be removed without injuring the caps or steps in which they are placed, or the building: and it is further found, that they are usually valued between outgoing and incoming tenants. Such a practice could not rationally have prevailed, if the things had not been generally understood to be in their nature capable of removal, and not fixtures properly so called: and therefore taking the practice as an explanation of their nature and character, we think they are to be considered as personal chattels, and consequently that this action of trover may be maintained." Suppose the present plaintiffs had become bankrupts, could anybody doubt that this ladder and crane and bench would have passed to their assignees as goods in their order and disposition? In *Trappes v. Harter*, 2 C. & *644] M. 153,† 3 Tyrwh. *604, in January, 1797, several persons carried on business in partnership as calico-printers; and, in the same month, certain premises on which their works were principally carried on were conveyed to one of the partners, in fee. The conveyance mentioned the premises to consist, besides land, of dwelling-houses, machine-house, and other buildings and erections, and stated them to be then in the possession of the partner to whom they were conveyed, and another partner. Various buildings and machines were afterwards, from time to time, erected on the premises by the firm, for the purpose of extending the works. The whole was firmly fixed to the freehold, and stood on that part of the land which was conveyed to one of the partners in 1797; but the part in question could be removed without material injury to the buildings. In the different stock-takings

of the firm, the land and buildings were always valued and classed separately from the machinery and fixtures. In the part of the country where the premises were situated, machinery of this description was constantly bought and sold distinctly from the freehold. The freehold in the premises having been subsequently conveyed to two of the partners, they, in 1828, mortgaged them to the plaintiff's wife, under the description of all the messuages, dwelling-houses, lands, and buildings therein mentioned, "and also all that and those the steam-engine, mill-gearing, heavy gear to millwright work, fixed machinery, and other matters and things, &c., then standing and being in and upon the thereby demised buildings, works, and premises, which in any manner constituted fixtures and appendages to the freehold of the same, or any part thereof." All the machinery, fixtures, &c., appeared to have been in the reputed ownership of the partners, who carried on the works until 1831, when they became bankrupts, and the defendants were appointed their assigns. The plaintiff, who was the husband of the mortgagee, [*645 had inspected statements of the affairs of the partners, which treated the machinery as not included in the mortgage, and had made no objections to such statements. In the month of April, 1831, the assignees sold all the machinery and fixtures, with the exception of two steam-engines, two water-wheels, an iron flooring, and other small articles; and the greater part of them were removed by the purchasers. The articles claimed by the mortgagee were all firmly fixed to the freehold, in such a manner, however, that they might easily be removed, without material injury to themselves or to the buildings. It was held, that the machinery did not belong to the inheritance, but was part of the personal estate of the bankrupts, and that it passed to the assignees; and that the machinery in question was not intended to pass, and did not pass, to the mortgagee under the mortgage-deed. In the course of the argument in that case,—2 C. & M. 177,†—Lord Lyndhurst, C. B., observes: "The screwing of a stocking-frame to the floor to keep it steady, would not make it a fixture." [CRESSWELL, J.—That has been observed upon as an obiter dictum. Was there any evidence here of the articles in question being chattels?] The true question is, whether there was any evidence of their being fixtures. [CRESSWELL, J.—Beyond doubt there was such evidence. You claim chattels: it lies on you to show that the articles you claim are chattels. The mere act of conversion will not make them goods and chattels.] There are many cases to show that things like these, and similarly attached to the premises, are chattels. [CRESSWELL, J.—In *Minshall v. Lloyd*, 2 M. & W. 450, 459,† which was an action of trover for steam-engines and other machinery, Parke, B., says: "We must take these engines, on the report of the learned judge, to have been in part affixed in a substantial *manner to the freehold, in the ordinary way in which [*646 steam-engines are erected; and the law is clearly settled by the

cases of *Lee v. Risdon*, 7 Taunt. 191 (E. C. L. R. vol. 2), 2 Marsh. 495 (E. C. L. R. vol. 4), and *Hallen v. Runder*, 1 C. M. & R. 266,† 3 Tyrwh. 959, that everything substantially and permanently affixed to the soil is in law a *fixture*. The principle of law is, that ‘quicquid solo plantatur, solo cedit.’ The right of a tenant is, only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ, for the benefit of the tenant’s creditors. I assent to the doctrine laid down in *Coombs v. Beaumont*, 5 B. & Ad. 72 (E. C. L. R. vol. 27), 2 N. & M. 235 (E. C. L. R. vol. 28), and *Boydell v. M’Michael*, 1 C. M. & R. 177,† 3 Tyrwh. 974, that such fixtures are not goods and chattels within the bankrupt law, though they are goods and chattels when made such by the tenant’s severance, or for the benefit of execution-creditors. The old law, as laid down by Lord Holt in *Poole’s Case*, 1 Salk. 368, cited in *Lyde v. Russell*, 1 B. & Ald. 394, and *Penton v. Robart*, 2 East, 88, was as I have stated. These engines, therefore, were never goods and chattels at all, so as to pass to the plaintiffs. They had only the same right of removal as the tenant, which certainly ceased in June, 1829,(a) and that right of removal would not have enabled him to sue in trover for them, even during his term. The judgment in *Davis v. Jones*, 2 B. & Ald. 165, proceeded entirely on the ground that the jibs, which were the subject of the action, were not fixtures at all, but mere personal chattels. *Here, there is no doubt that the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants*; and I am of opinion that trover is not maintainable for *them.*” *Trappes v. Harter* has been overruled by *647] two subsequent cases.(b)] The defendant’s unqualified refusal to deliver up the fixtures on demand, was evidence for the jury of a conversion; and the finding of the jury establishes that he intended to appropriate them to his own use.

Shee, Serjt., and *Cockle*, in support of the rule.—The general rule is, that everything which is fixed or annexed to the soil becomes part of the soil. Upon that rule several exceptions have from time to time been engrafted,—some, as respects the things themselves, others, as respects the parties between whom the question arises, as, between heir and executor, between executor and remainder-man or reversioner, and between landlord and tenant. In *Amos and Ferard on Fixtures*, pp. 1, 2, it is said, “The term *fixtures* is used by writers with various significations; but it is always applied to articles of a personal nature which have been affixed to land. There is, however, another sense in which

(a) When the tenancy was determined.

(b) Parke, B., in *Minshall v. Lloyd*, 2 M. & W. 456,† says that “some doubt has been thrown on *Trappes v. Harter*, as far as it bears upon this point.”

the term fixtures is very frequently used, viz., as denoting those personal chattels which have been annexed to land, and which *may* be afterwards severed and removed by the party who has annexed them, or his personal representative, against the will of the owner of the freehold." If the tenant omits to remove fixtures which he lawfully may remove during his term, they become irremovable, they are the property of the landlord. In *Birch v. Dawson*, 6 C. & P. 658 (E. C. L. R. vol. 25), Littledale, J., even doubted whether a nailed-down carpet would not come within the description of "fixed furniture." The whole subject is elaborately discussed in the notes to *Elwes v. Mawe*, 3 East, 38, in 2 Smith's *Leading Cases, 114—121. Each case, as *Dallas, C.* [*648 J., remarks in *Buckland v. Butterfield*, 2 B. & B. 54 (E. C. L. R. vol. 6), 4 J. B. Moore, 440 (E. C. L. R. vol. 16), must depend on its special and peculiar circumstances. [CRESWELL, J.—Suppose the landlord here had demanded the ladder, and the tenant, the now defendant, had refused to let him have it, saying that the premises were demised to him with the ladder,—would that have amounted to a conversion?] Clearly not. The ladder became parcel of the letting; without it, the tenant would have no means of access to the warehouse above. In *Sheppard's Touchstone*, Preston's edit. Vol. I. p. 470, it is said: "The incidents of a house held for an estate of inheritance, &c., as, glass windows annexed with nails or otherwise to the windows, the wainscot fixed by nails, screws, or irons put through the posts or walls, tables dormant, furnaces of lead and brass, and vats in a brew and dye-house standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house (though fastened to no wall), a copper, or lead fixed to the house, the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house, albeit the executor or administrator have, in his own right, a lease for years of the house, and by that means hath the house also. [This rule is still applied as between the heir and executor, or the executor and a devisee; but, as between lord and tenant, and a tenant of a particular estate and a remainder-man, the rule of the common law is greatly relaxed,—*Lord Petre v. Heneage*, 12 Mod. 520.] But, if the glass be from the windows, or there be wainscot loose, or doors more than are used, that are not hanging, or the like: these things shall go to the executor or administrator. [But a mill-stone, taken from the mill for a particular purpose, still remains part of the mill, and will belong to the heir: **Toller's Exec.* 196.]" In *Hellawell v. Eastwood*, 6 Exch. 295,† [*649 the question was, whether machinery fixed for the purposes of manufacture by means of screws, some into the wooden floors of the mill, and some by being sunk into the stone flooring, and secured there by molten lead, were distrainable for rent. They were things in which the landlord had a contingent interest as landlord, if not removed during the

term. The landlord waived his right: as against the tenant, they were personal chattels. There, as well as in *Davis v. Jones*, 2 B. & Ald. 165, the articles in question were trade-fixtures. [JERVIS, C. J.—So may these be.] There was no evidence that they were. In *Roffey v. Henderson*, 17 Q. B. 574 (E. C. L. R. vol. 79), the plaintiff, tenant of a house for term of years, being possessed of shelves, stoves, ranges, ovens, boilers, and other articles of household use, his own property, but annexed to the freehold, requested the landlord to purchase them at the expiration of the term, or let them remain for purchase by the incoming tenant, but to be taken away by the plaintiff if the tenant should refuse them. The landlord wrote an answer, declining to purchase, but adding, "I have no objection to your leaving them on the premises, and making the best terms you can with the incoming tenant." The articles remained unsevered from the freehold till the entry of the new tenant, who came in under a demise from the same landlord, but who declined to take them. The plaintiff then (after the tenant had been two months in possession) demanded liberty to enter and remove the fixtures; but the tenant refused permission; and the plaintiff thereupon brought case for the hindrance, and trover, against the tenant. It was held that trover would not lie for the above articles, unsevered from the freehold. Pateson, J., there says: "As to the question whether or not trover lies, cases certainly run very near the wind: but the general principle is, that, *650] where the *articles are of such a kind as to become fixed to the freehold, the tenant, if they are tenant's fixtures, may remove them during the term, or during such time as he may hold possession after the term in the capacity of a tenant.^(a) That is the only right which exists on this head between him and the landlord. If the articles had been so disannexed, they might have been chattels for which trover would have lain; or if they had never been annexed: but I do not find it suggested here that the things in question were not annexed to the freehold, or had been disannexed. The question of their being a gift to the landlord is not raised here: this is not the ground on which the plaintiff's claim is disputed, but the nature of the things themselves, from which it results, that (as my Brother Williams has stated in note (r) to *Greene v. Cole*, 2 Wms. Saund. 259 c, 6th edit.), until they are severed from the freehold, they do not become goods and chattels, and trover does not lie to recover them." There was no evidence of any severance in this case. A vane attached to the roof of a house, though in a certain sense not *fixed*, inasmuch as it is intended to turn with the wind, would nevertheless go with the house. So, here, the crane being so fixed as to swing does not make it any other than a fixture: it would not be available as a source of power unless fixed. It is not, therefore, motion, but locomotion, that deprives a chattel of the character of a "fixture." Upon the whole, it is submitted that all these articles were fixtures, and

(a) See *Heap v. Barton*, 12 C. B. 274 (E. C. L. R. vol. 73).

that, whatever right the tenant might have had to disannex them during the continuance of his possession in the character of tenant, he lost that right by omitting to avail himself of it at the proper time.(a)

Cur. adv. vult.

*MAULE, J., now delivered the judgment of the court.

In the case of *Wilde v. Waters*, which was tried before me at [*651 the sittings in London in Easter Term last, leave was reserved to the defendant to move to enter a nonsuit. A motion was accordingly made to that effect, and the case was argued early in the last term, before the Lord Chief Justice, my Brothers Cresswell and Crowder, and myself. My Lord, being engaged at *Nisi Prius*, has desired me to express our joint opinion.

It appears that this was an action of trover brought to recover the value of certain goods. The goods in question consisted of fixtures,—amongst others, a ladder, a crane, and a bench. The case was very fully argued, and the law as to fixtures was gone into at very considerable length: but I do not conceive it to be necessary to give our opinion at any length.

Generally speaking, no doubt, fixtures are part of the freehold, and are not such goods and chattels as can be made the subject of an action of trover. But there are various exceptions to this rule, in respect of things which are set up for ornament, or for the purpose of trade, or for other particular purposes. As to these, there are many distinctions, some of which are nice and intricate. In the present case, however, there is nothing special or peculiar in the fixtures the value of which is sought to be recovered. Neither the ladder, the crane, *nor the [*652 bench was ornamental. There was nothing in the manner in which they were affixed to the premises at all special or peculiar; nothing to take the case out of the ordinary rule. They were put up in the ordinary way, and for the ordinary use and convenience of the premises to which they were affixed. The ladder was nailed to the floor and the joists above, and was the only mode of access to the loft: the crane was in like manner fixed to the floor and the joists above, in the usual way: and the bench was fixed in no unusual manner to the wall.

We therefore think that these articles fall within the general rule; and that trover will not lie for them: consequently, the rule to enter a nonsuit will be made absolute.

Rule absolute.

(a) See *Elliot v. Bishop*, 10 Exch. 496, 512,† where Platt, B., says: “So long as the chattel is annexed, it is in some sense a fixture, but the tenant’s right to remove or obligation to leave it, may depend on the subject demised. If a landlord demised a house with grates or *gas-fittings* at an entire rent, they would belong to him at the expiration of the term. But, if he had let the house unfurnished with those conveniences, and the tenant, for the enjoyment of his occupation, fixes them in the house, the tenant, unless he had contracted to leave them behind, might undoubtedly remove them during his term.”

JOHN MELLING v. ISAAC LEAK and Another. June 25.

A. devised a messuage to B. and C., in trust for D. for life, and, after his death, on certain other trusts. A. died in 1815. In 1818, the plaintiff, who had married a daughter of one E., who it was assumed had been let into possession of the messuage by D., the tenant for life, succeeded E. in the possession of the premises, and remained therein, without payment of rent to or acknowledgment of title in any one, until 1854, when the heir-at-law of B., the surviving trustee (the tenant for life being dead), turned him out:—Held, that the plaintiff had, by his adverse possession for more than twenty years, acquired a title as well against the trustees as against the cestui que trust; for that, although a cestui que trust who is in possession with the consent or acquiescence of the trustees may be regarded as their tenant at will, yet, if he is only allowed to receive the rents, or otherwise deal with the property in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees who choose to allow him to act for them in the management of the estate.

TRESPASS for breaking and entering a messuage of the plaintiff situate in Upper Bentham, in the township of Bentham, in the county of York, making a noise therein, and forcibly expelling the plaintiff and his wife therefrom; with a count for seizing and converting the goods, to wit, household furniture and wearing apparel, of the plaintiff.

Pleas,—first, not guilty—secondly, to the first count, *that
*653] the messuage was not the messuage of the plaintiff, as alleged.

Thirdly, that the said messuage, at the said times when, &c., with the appurtenances, was, and now is, the messuage, soil, and freehold of the defendant Isaac Leak; wherefore the said Isaac Leak, in his own right, and the defendant Willan as the servant and by the command of the said Isaac Leak, broke and entered the said messuage, and committed therein the alleged trespasses in the first count mentioned; and, because the said goods and chattels then had been and were wrongfully put and placed, and were then wrongfully in and upon the said messuage and premises of the said Isaac Leak, encumbering the same, and doing damage there to him, he, the said Isaac Leak, in his own right, and Willan as his servant and by his command, seized and took the said goods and chattels in and upon the said messuage and premises, and so encumbering the same, and removed and carried them to a small and convenient distance, and there left the same for the plaintiff's use, doing no unnecessary damage to the plaintiff,—which were the supposed trespasses in the declaration mentioned.

Fourthly, that, before the committing the supposed trespasses, and from thence until the giving of the notice to quit thereafter mentioned, the plaintiff held the said messuage, together with a garden and premises, as tenant thereof to one John Leak, at the will of the said John Leak, without being liable to the payment of any rent, and no fine having been reserved or made payable on or in respect of the said tenancy, the reversion, to wit, in fee-simple, of and in the said messuage, garden, and premises, expectant on the termination of the said tenancy, during all the time aforesaid, and still, being in and belonging to the said John Leak in his lifetime, and the said Isaac Leak, as his eldest

son and *heir-at-law, since his death; and thereupon all the term and interest of the plaintiff in the said premises became and were [*654 duly determined, to wit, by a legal notice to quit given by the said John Leak in his lifetime, whereby the plaintiff was duly required to quit and deliver up possession thereof on a certain day and year therein named; whereupon the said John Leak, in his lifetime, and the said Isaac Leak, upon his death, became and were entitled to the possession of the said premises; yet the plaintiff, who then actually occupied the same, after the expiration of the said notice to quit, and until the committing of the alleged trespasses, neglected and refused to quit and deliver up possession thereof; whereupon, and after the determination of the said tenancy as aforesaid, and in pursuance of the 1 & 2 Vict. c. 74, "to facilitate the recovery of possession of tenements after the determination of the tenancy," the said Isaac Leak caused the plaintiff to be duly served, to wit, personally, with a written notice, in the form set forth in the schedule to that act, and signed by the said Isaac Leak, of his intention to proceed and apply to recover possession of the said premises under the authority of and according to the mode prescribed by such act, and whereby the plaintiff had notice and was informed, that, unless peaceable possession of the said premises should be given to the said Isaac Leak on or before the expiration of seven clear days from the service of that notice, he should, on Friday, the 12th of May then instant (1854), at 11 of the clock on the same day, at Ingleton, apply to Her Majesty's justices of the peace acting for the district of Ewcross, in petty sessions assembled (being the district within which the said premises were situate), to issue their warrant directing the constables of the said district to enter and to take possession of the said premises, and to eject any person therefrom: that the said last-mentioned notice *was, at the time of the service thereof, read over and explained [*655 to the plaintiff by the person who served the same; that the plaintiff did not (although seven clear days and more elapsed between the service of the said notice and the said 12th of May) comply with such notice, but neglected and refused to quit or deliver up possession; whereupon the said Isaac Leak, by his agent, at the said day and time and place so appointed in and by the said last-mentioned notice, appeared before the said justices in petty sessions assembled, and then and there duly made his complaint in writing of the matter aforesaid, according to and in the form prescribed by the said act; yet the plaintiff did not appear at the said time and place appointed, or in any other manner according to the said notice, and show to the satisfaction of the said justices, or of any justice, reasonable or any cause why possession should not be given up of the said premises under or according to the provisions of the said act; that the said Isaac Leak then and there gave to the said justices such proof as by the said act was and is required; whereupon, that is to say, on the day and year last aforesaid, two of

the said justices duly issued their warrant under their hands and seals, directed to James Greenup and all other the constables and peace officers acting in and for the said district, in the form required by the said act, and commanding them to enter (by force, if needful), and with or without the aid of (the defendant) Willan as such agent, or any other person or persons they might think requisite to call to their assistance, into and upon the said premises, and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said Isaac Leak; which warrant was thereupon delivered to William Exten and James Greenup, two of the constables for the said district, to be *656] executed in due form of law; and, by virtue thereof *(the provisions of the said act having been in all respects observed and complied with on the part of the defendants), the said last-mentioned constables afterwards, and not less than twenty-one, nor more than thirty clear days from the date of the said warrant, that is to say, on Wednesday, the 7th of June, in the year last aforesaid, between the hours of 9 in the forenoon and 4 in the afternoon, being the said times when, &c., in the declaration mentioned, broke and entered the said messuage and premises in order to execute, and did then and there execute, the said warrant according to law, and in doing the matter aforesaid the alleged trespasses in the first count mentioned were necessarily and unavoidably committed; and because the said goods and chattels were then wrongfully remaining and being in and upon the said messuage and premises, encumbering the same, and the plaintiff neglected and refused to remove them, although requested so to do, the said constables, on the execution of the said warrant, also seized and took the said goods and chattels in and upon the said messuage and premises, and removed and carried them to a small and convenient distance from and out of the said premises, and there left the same for the plaintiff's use, doing no unnecessary damage thereto, or to the plaintiff, no more force being used, and no more being done on the occasions aforesaid, than was needful and necessary in and for the purpose of executing the said warrant; which were the supposed trespasses in the declaration mentioned.

Fifthly, to the second count, that the defendants did what was complained of in that count by the plaintiff's leave.

Upon each of these pleas issue was joined.

The cause was tried before Parke, B., at the last Spring Assizes at York, without a jury. The facts were as follows:—

*657] *Isaac Melling, the father of the plaintiff, being seised in fee of the messuage which was the subject of this action, by his will, dated the 15th of August, 1813, devised as follows:—

“I hereby order and direct that all my just debts, funeral and testamentary expenses shall be paid off and discharged by my executors out of my personal estate. I give and bequeath unto my son John

Melling the legacy or sum of 100*l.*, to be paid to him by my executors hereinafter named, out of my personal estate, at the end of twelve calendar months next after my decease." And, after devising to his wife Mary a messuage or dwelling-house for her life, he gave and devised and bequeathed unto John Leak and Thomas Wildman "all his messuages or dwelling-houses, buildings, lands, grounds, hereditaments, and real estate, situate, lying, and being in Upper Bentham aforesaid, or elsewhere (subject to the life-estate of his said wife of and in the said dwelling-house), and also all his goods, chattels, personal estate and effects whatsoever and wheresoever, To hold to themselves the said John Leak and Thomas Wildman, their heirs, executors, administrators, and assigns, for ever, or for and during all his estate and interest therein, to, for, and upon the several uses, ends, intents, and purposes thereafter mentioned, expressed, and declared, viz. upon trust that they the said trustees, or the survivor of them, or the heirs, executors, or administrators of such survivor, should, so soon after his decease as conveniently might be, convert into money all his personal estate thereinbefore bequeathed to them as aforesaid, and thereout pay and discharge all his just debts, funeral and testamentary expenses, and the charge of proving his will, and also the said legacy of 100*l.* thereinbefore bequeathed to his said son John; and, after the payment aforesaid, to pay, distribute, and divide the residue and remainder of his said personal estate *unto and equally between and amongst his son William, his said [658 son John, his (the said testator's) two daughters Dorothy Carr, the wife of Richard Carr, and Jane Leak, the wife of the said John Leak, share and share alike; but, in case any of his said children should happen to die before his or her share of the money thereby given to them should become due or payable, leaving lawful issue, such issue should have and be entitled to his, her, or their deceased parent's share, if more than one, equally amongst them: And upon further trust that they, the said John Leak and Thomas Wildman, or the survivor of them, or the heirs of such survivor, shall and do demise and let, and receive the rents and profits of all that my messuage or tenement called Butterber, situate, lying, and being in Upper Bentham aforesaid, and consisting of a dwelling-house, barn, out-buildings, and of seven acres and a half of land, or thereabouts, now in the occupation of myself and of the said John Leak, and which I purchased from Mr. Butler and J. Campbell's heirs; and also shall and do out of the same rents and profits pay unto my said wife Mary the annuity or yearly sum of 12*l.* for and during the term of her natural life, by four equal quarterly payments in each year, &c., and shall and do pay and apply to, or permit and suffer my said son William to have, receive, and take the residue and remainder of the same rents and profits for and during the term of his natural life; and, from and immediately after the decease of my said son William, then upon trust that the said John Leak and Thomas

Wildman, or the survivor of them, or the heirs of such survivor, shall and do absolutely sell and dispose of my said messuage or tenement called Butterber, with the said buildings and lands thereunto belonging, to the best advantage in their judgment, either together or in parcels, and, either by public or private contract, grant, convey, and assure the *659] same to the purchaser or purchasers thereof, his, her, and their heirs and assigns, for ever, subject, nevertheless, to the said annuity of 12*l.* to my said wife, in case she shall be then living, and receive the purchase or consideration money for the same; and upon trust to pay and apply the money to arise from such sale or sales, after payment of the expenses thereof, and of the trusts, unto and equally between or amongst Mary Melling, the natural child of my said son William, and all and every the lawful children of my said son William hereafter to be born, share and share alike; and, in case my said son William should happen to die without leaving any lawful child or children, then to pay and apply the sum of 200*l.*, part of the money arising or to arise from the said sale or sales, unto the said Mary Melling, and the residue and remainder of the same moneys unto and equally amongst all and every my lawful grandchildren now born or hereafter to be born, and living at the decease of my said son William, share and share alike."

Isaac Melling, the testator, died in the year 1815, leaving a widow and two sons, viz. William Melling, and John Melling, the now plaintiff. The widow died in 1830. At the death of the testator, John Leak, one of the trustees, was in possession of the house. He remained in possession for a short time, and was succeeded by one William Clarke. The plaintiff married Clarke's daughter in July, 1817, and occupied the house thenceforward jointly with Clarke for about six months, when Clarke quitted, leaving the plaintiff in possession; and the plaintiff remained in, without paying any rent or acknowledging any title, until the 7th of June, 1854.

In November, 1853, John Leak, the surviving trustee, died,—William Melling, the testator's son, having died a few months before.

*660] On the 7th of June, 1854, the defendant Isaac Leak, *claiming as heir-at-law of John Leak, entered, and turned the plaintiff out.

Upon these facts, the learned judge was of opinion that the plaintiff was entitled to a verdict, inasmuch as, by occupying for more than twenty years without any payment of rent or any acknowledgment of title either in the trustees or the cestui que trust, he had gained a title as against both: but he reserved to the defendant leave to move.

Day (for *Cowling*), in Easter Term, accordingly obtained a rule nisi to enter the verdict for the defendants, on the ground that the defendant Leak and his father John Leak were not barred by the statute of limitations 3 & 4 W. 4, c. 27, and that both the defendants therefore were

entitled to a verdict, and that the learned judge ought to have so ruled. He referred to *Garrard v. Tuck*, 8 C. B. 231 (E. C. L. R. vol. 65), where it was held that the 3d section of the 3 & 4 W. 4, c. 27, does not apply to the case of a cestui que trust holding possession of land under the trustee.

Manisty, on a subsequent day in the same term, showed cause.—The facts are shortly these:—The testator died in 1815, leaving John Leak and Thomas Wildman, the trustees named in his will, him surviving, and leaving a widow and two sons, William and John, the latter of whom is the now plaintiff. In 1817, Clarke being then in possession of the house,—probably put in by William Melling—John Melling marries Clarke's daughter, and goes also to reside there; and, from that time until the 7th of June, 1854, he remains in undisturbed possession (Clarke having gone out shortly after the marriage), without ever being asked to pay any rent, and without any acknowledgment of title to any person. He, therefore, it is submitted, acquired a title *both against the trustees and the cestui que trust. A cestui que trust, or one claiming through him, cannot acquire a title as [*661 against the trustee,—3 & 4 W. 4, c. 27, s. 7:(a) but that cannot apply to the case of a third person acquiring a title adverse to both. [WILLIAMS, J.—I do not assume that section to show that the cestui que trust is tenant at will to the trustee.] The section has reference entirely to persons who are in possession as tenants at will. The question here is, whether Isaac Leak could have maintained ejectment under s. 2. If not, the plaintiff is entitled to recover. That section enacts, “that, after the 31st of December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.” And the 3d section enacts, “that, in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter *is mentioned (that is to say), when the person claiming such land [*662 or rent, or some person through whom he claims, shall, in respect of the interest claimed, have been in possession or in receipt of the profits

(a) “When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will within the meaning of this clause, to his mortgagee or trustee.”

of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and, when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and, when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument;" &c. Here, John Leak was out of possession in 1817. The defendant, however, contends that he is in a situation to have maintained ejectment, because the plaintiff was put in by one having a beneficial interest in the property. What difference can that make? There is no proviso *663] in the statute to save him. [WILLIAMS, J.—The case of trustee and cestui que trust is put in the same clause as that of mortgagor and mortgagee? Is the mortgagor tenant at will to the mortgagee?] Sir E. Sugden, in his essay on the statutes of limitation as to real actions, p. 36, says there are cases where title may be acquired against trustee and cestui que trust. "The third provision of the 3d section," he says, "coupled with the 2d section, has been held to apply to a term of years assigned to a trustee to attend the inheritance, where of course the trustee is not in possession, so that the twenty years would run against him from the time when he became entitled to the possession. In the case in which this was decided,—*Doe d. Jacobs v. Phillips*, 10 Q. B. 130 (E. C. L. R. vol. 59),—there had been no demand of possession before ejectment brought. Patteson, J., observed, that he would not say the words of the 3d section were specially pointed to the case of trustee and cestui que trust, but they certainly seemed to be very applicable. Now, if the termor could have brought ejectment within twenty years before this action was brought, there was an end of the case. The 3d section seemed clear, and there was nothing in any other part of the act to militate against their construction of it. Coleridge, J., added, that, to sustain this action, it must be conceded

that the termor might sue without demand of possession. Then, the 2d section, with which the 3d section, as being explanatory of it, was to be read, seemed to embrace this very case, inasmuch as the right of entry first accrued beyond the period limited. The point was not, however, fairly raised in the case of *Doe d. Jacobs v. Phillips*, because no demand of possession had been made; and, considering the case to fall within the 2d section, and the branch relied upon of the 3d section, if the trustee of the term could recover without a demand, it was manifest, as pointed out by the court, *that he might have recovered, [*664 without any previous demand, more than twenty years before the action brought; and in that view his action was too late. It was not decided that the cestui que trust was not tenant at will to his trustee, nor was it even decided that the demand of possession would not determine the will. Indeed, it appears that the plaintiffs were trustees for infants, and that both the trustees and the cestuis que trust had been kept out of possession for more than twenty years by the uncles and aunts of the latter, and that the case fell properly within the 12th section. If, as Maule, J., subsequently observed,(a) not barred in twenty years, they never would be. *It seems to have been a case in which both trustee and cestui que trust were barred.*" It is submitted, therefore, that the ruling of the learned judge at the trial was correct.

Cowling and Hugh Hill, in support of the rule.—Assuming that the cestui que trust, William Melling, was the party by whom Clarke was let into possession, a twenty years' possession by Clarke, or by any person let in by him, could be no bar,—when a new duty devolved upon the trustees after the death of the cestui que trust,—to an action by them. What would have been the state of things if the cestui que trust had himself remained in possession? Would that have barred the right of the trustees? *Garrard v. Tuck*, 8 C. B. 231 (E. C. L. R. vol. 65), shows that it would not. In *Doe d. Jacobs v. Phillips*, it appears the term was created in 1766, by way of mortgage to one Hubbard. In the following year, Hubbard became the absolute purchaser in fee; and the residue of the term was at the same time assigned to one Holyhead, in trust for Hubbard, and to attend the inheritance. The lessor of the plaintiff, who brought the ejectment on behalf of infants who *claimed through Hubbard, throws himself back [*665 on the title of the termor. The termor being dead, a limited administration was taken out, and the action brought in his name. The court held, that there was no pretence for saying that the termor had any right to recover. Sir E. Sugden says, "It was not decided that the cestui que trust was not tenant at will to his trustee." But, in the following page (p. 38), he says: "In a later case,—*Garrard v. Tuck*,—where, upon a writ of dower, the tenant pleaded an outstanding term, the Court of Common Pleas held, that, in the case of an

(a) In *Garrard v. Tuck*, 8 C. B. 242 (E. C. L. R. vol. 65).

attendant term, the cestui que trust was tenant at will to his trustee, unaffected by the 7th section, and that, whilst the estate at will remained, the statute did not operate: and this seems to be the better opinion. Wilde, C. J., in delivering the opinion of the court,^(a) observed that the general object of the act seemed to have been to settle the rights of persons adversely litigating with each other, not to deal with cases like that of trustee and cestui que trust, where, although there are two parties, one only is interested, and that the party beneficially entitled. The term having been assigned to attend the inheritance, the assignee became trustee, and the purchaser cestui que trust during the term; the cestui que trust entering into possession of the land, he was, at law, tenant at will of the trustee." The result of that very learned and elaborate judgment is, as Sir E. Sugden observes, that, until the tenancy at will is determined, the right to enter does not exist, and consequently the period of limitation does not commence running. "This well-considered view of the statute," he adds, p. 41, "is not now of much importance as to attendant terms, but it is of great importance with *666] reference to other cases." [WILLIAMS, J.—This is *not a case where the trust is of such a nature that the intention of the testator would be carried into effect by the cestui que trust remaining in possession.] All that the trustees had to do, at least during William Melling's lifetime, was, to see that the annuity was duly paid to the testator's widow, and to permit William Melling to take the residue. William was in the actual possession of one of the cottages (his mother living with him), and he let Clarke into possession of the other. So long as the estate at will remains, the statute does not run; and the estate at will does remain, although William allows a third person to keep possession of one part of the premises. At p. 54, Sir E. Sugden remarks,—“When any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as *tenant at will*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, will be deemed to have first accrued *either* at the determination of such tenancy, *or* at the expiration of one year next after the commencement of *such* tenancy, at which time such tenancy will be deemed to have determined; but it is provided that no mortgagor or cestui que trust shall be deemed to be tenant at will within the meaning of this clause to his mortgagee or trustee, and which proviso has been held to apply only to express trusts: per Patteson, J., and Cresswell, J., in *Doe d. Stanway v. Rock*, 4 M. & G. 32 (E. C. L. R. vol. 48). The words ‘within the meaning of this clause,’ should not be lost sight of; for, the provision is not that no mortgagor or cestui que trust shall be deemed to be a tenant at will to his mortgagee or trustee, but that none shall be such within this provision; and

(a) It was written by the late Mr. Justice Coltman.

therefore, as we have already seen, a cestui que trust has been held still to be a tenant at will to his trustee under the general provision in this act (ss. 2 and 3), and time will not run until the tenancy is *regularly determined,"—citing *Garrard v. Tuck*. The mere [*667 fact of the trustee being out of possession will not bar him: he is not barred, it is submitted, until he does something to determine his will. [CRESSWELL, J.—What is the distinction between a tenancy at will and the next degree of interest?] This court declined to define it in *Garrard v. Tuck*. [WILLIAMS, J.—Mortgagee and mortgagor do not stand in the ordinary position of lessor and lessee at will. The mortgagee may bring an action without determining his will: the lessor cannot.] The trustee may at any time turn out the cestui que trust. He is not *strictly* tenant at will at all. [WILLIAMS, J.—But for the authorities cited, I should have thought the reason was, because the possession of the mortgagor and the cestui que trust was the possession of the mortgagee or trustee,—as if a bailiff were in. The statute does not intend to alter the relative position of the mortgagor and mortgagee or trustee and cestui que trust.] That relation was considered in *Partridge v. Bere*, 5 B. & Ald. 604 (E. C. L. R. vol. 7), 1 D. & R. 272 (E. C. L. R. vol. 16). [CROWDER, J.—In a subsequent case,—*Doe d. Roby v. Maisey*, 8 B. & C. 767 (E. C. L. R. vol. 15), 3 M. & R. 107,(a) it was held, that, where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most tenant by sufferance only, and may be treated either as tenant or trespasser, at the election of the mortgagee.] As regards *this* statute, it is submitted, the relation of tenant at will is created. [WILLIAMS, J.—That may be the answer.]

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court:—

In this case the question was, whether the plaintiff *had gained a title, under the statute 3 & 4 W. 4, c. 27, against the defend- [*668 ants, by having occupied more than twenty years without any payment of rent or sufficient acknowledgment of their title.

On the trial it appeared that Isaac Melling, the father of the plaintiff, being seised in fee of the house which is the subject of the action, devised it to John Leak and Thomas Wildman as trustees (giving them the legal estate in fee), in trust for William Melling (the brother of the plaintiff) for life, and, after his death, on certain other trusts. The testator died in 1815. At that time Leak (one of the trustees) was in possession of the house in question. He continued there a little time, and was succeeded by one William Clarke, who continued to occupy till the plaintiff married his daughter, and held one part of the house, Clarke continuing to occupy the other, until a period more than twenty years before the entry of the defendants which was the cause of action.

(a) And see *Doe d. Fisher v. Giles*, 5 Bingh. 421 (E. C. L. R. vol. 15), 2 M. & P. 749.

When Clarke left, the plaintiff occupied the whole, and continued to do so, without paying any rent, until the 7th of June, 1854, when, William Melling, the cestui que trust, being dead, the defendants, as representing the trustees, entered, and expelled the plaintiff from the possession of the house.

On these facts appearing at the trial,—without a jury,—before Parke, B., that learned judge was of opinion that the plaintiff was entitled to a verdict, and directed it to be entered accordingly; inasmuch as, by occupying without payment of rent or acknowledging title either to the trustees or the cestui que trust, he had gained a title against both. But the learned judge reserved the point.

On the argument before this court, it was contended, on behalf of the defendants, that the learned Baron was wrong, because, according to the case of *Garrard v. Tuck*, 8 C. B. 231 (E. C. L. R. vol. 65), a tenancy *669] at will subsisted between the trustees and the cestui que trust, which tenancy was never determined till his death in 1853, and that the title of the trustees to the possession did not therefore accrue till that time.

The authority cited certainly supports the doctrine that a cestui que trust *who is let into possession of the trust estate by the trustee*, becomes his tenant at will, and the right of entry under the 2d section of the statute 3 & 4 W. 4, c. 27, accrues only on the determination of such tenancy at will. And, accordingly, in the present case, if the cestui que trust, William Melling, had been let into possession by the trustees, a tenancy at will would have been established, which would not have been determined by his letting in Clarke as his under-tenant, unless the trustees had had notice of such underletting (of which there was no evidence): for, though the general rule is, that a tenancy at will is not assignable, because the transfer determines the tenancy, yet the rule is subject to the qualification that a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord: *Pinhorn v. Souster*, 8 Exch. 763.†

But, although it may be well argued, on general principle, as well as on the authority of *Garrard v. Tuck*, that a cestui que trust who is in possession with the consent, or even the mere acquiescence, of the trustee, must be regarded as his tenant at will, yet this doctrine (as it is observed in the excellent note of Messrs. Morley and Coote, in their edition of *Watkins on Conveyancing*, p. 19) applies only to the case where the cestui que trust is the actual occupant. If he is only allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, who choose to allow him to act for them in the *670] management of the estate. And the consequence *appears inevitable, that, if the actual occupier is under such circumstances permitted to occupy for more than the twenty years prescribed by the

statute 3 & 4 W. 4, s. 27, without paying rent, the result must be that the trustees lose their title, exactly as in the ordinary case of landlord and tenant.

In the present case, William Melling, the cestui que trust, was never in the actual occupation; and, assuming, that, by his permission, Clarke obtained possession, the management of the estate having been intrusted by the trustees to him as the beneficial owner, yet this state of things did not in our opinion constitute a tenancy at will between him and the trustees. He merely acted, we think, as their bailiff or agent in the transaction.

For these reasons, we think that the opinion of Mr. Baron Parke was well founded, and that the verdict for the plaintiff ought not to be disturbed.

Rule discharged.

*IN THE EXCHEQUER CHAMBER. [*671

TRINITY VACATION, 1855.

DROUET, sued with Others, v. TAYLOR. *June 13.*

A company was projected for the working of mines in Belgium. A prospectus was printed, describing the objects of the association, naming A., B., C., and D. as directors, and Messrs. Martin, Stone, and Co., as the bankers of the company, and stating that "the deposits would be returned in full, without any deduction for preliminary expenses, in the event of the non-prosecution of the company."

In an action by an allottee of 500 shares, to recover back, on the abandonment of the project, the 250*l.* paid by him thereon to Martin, Stone, & Co., the plaintiff, in order to show D. to have been a director, proved, that he was seen ten or twelve times at the offices of the company, and twice in the directors' room; that he took some of the prospectuses for the purpose of circulation amongst his acquaintance; and that his name appeared, with the others, at the head of the company's account with the bankers.

The plaintiff also put in the bankers' pass-book, containing entries of receipts of cash on account of the company; but there was nothing to identify any part of it as the 250*l.* paid in by the plaintiff. The pass-book was received, as being evidence because proved to have been seen in the hands of C., one of the defendants:—

Held, that the pass-book was no evidence against D., there being no proof of the account having been opened in his name, with his consent, or subsequent acquiescence; and that there was no evidence to go to the jury that D. was a director at the time that the plaintiff paid the 250*l.* to Martin, Stone, & Co.

THIS was an action by Taylor against John Stratford Best, Charles Drouet, William Henry Sperling, and George Noel Clarke, for money alleged to have been received by them to his use.

The writ was endorsed in the special form provided by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 25.

Clarke had judgment against him for want of appearance, and the other defendants severally pleaded never indebted, whereupon issue was joined.

The cause was tried before Jervis, C. J., at the sittings at Guildhall after Hilary Term, 1854.

The plaintiff gave in evidence a prospectus, being the prospectus mentioned in the evidence of Benjamin Naylor hereinafter mentioned, in the terms following,—

*672] *“ Royal Nassau Sulphate of Barytes Mines.
 “ Société Anglo-Belgique.
 “ Established in Belgium under the law ‘en commandite.’
 “ Capital 34,000*l.*, in 6800 shares of 1*l.* (fully paid up), to be issued at 10*s.*; of which 20,000 shares have been subscribed for in Belgium.

“ This being a company ‘en commandite,’ and the shares being to bearer (au porteur), no registration is required, and no deed has to be signed, and all liability is legally restricted to the amount paid.

“ The deposits will be returned in full, without any deduction for preliminary expenses, in the event of the non-prosecution of this company.

“ Chief offices in Brussels, 85, Rue Brabant.

“ Council in Brussels.

[Here followed the names and descriptions of four persons resident in Brussels.]

“ London Agency, 70, King William Street, City.

“ Council in London.

[Here followed the names of the four defendants, and that of another person; and also the names of the representatives at Brussels and in London, the secretary, standing counsel, bankers, notary, official auditor, solicitors, and stock-brokers.]

“ This company proposes to purchase and work, under unusually advantageous circumstances, an extensive deposit of that valuable mineral, sulphate of barytes. The mines consist of two concessions in perpetuity, situate on the range of the Faunus, near the village of Kiedrich, two leagues from Mayence, and are at present in a state to produce from 400 to 500 tons per month, from three pits already opened: but, on the further opening of the mines, the produce may readily be augmented to from 800 to 1200 tons per month.

*673] *“ The use of sulphate of barytes in white lead and white zinc is most extensive; and the general adoption of it in the manufacture of paper-hanging, cement, plaster of Paris, grease, soap, and, of late, in the crystallization of beet-root sugar, by manufacturers on the continent, has much increased the demand for it, so that large quantities command a ready sale at highly remunerative prices.

“ The expense of extracting the sulphate of barytes from the mines is very trifling, the carriage and grinding and other charges forming the larger portion of the cost of this mineral.

“ As the greatest demand for it exists at Paris, where the price ranges from 100 fr. to 150 fr. per ton of 1000 kilos, according to quality, it is

desirable to avoid the expense of carriage to Brussels, where the mineral has hitherto been ground. To effect this object, it will be necessary to erect mills, together with establishments for packing, &c., near the mines, or that the prepared mineral may be transported, ready for use, direct from the mines to Paris.

"Independent of the sales which can be made in Belgium, England, and other countries, those which could be effected at Paris alone may be reckoned at 1000 tons per month, for which quantity contracts could be made at once with every certainty of an increased demand in consequence of the favourable results obtained from its use in the above-mentioned manufactures.

"Taking the consumption of 1000 tons as the basis, and calculating the selling price at only 100 fr. or 4*l.* per ton of 1000 kilos, we obtain the sum of £4,000

"Less brokerage, bankers' commission, &c., of 5 per cent. 200

£3,800

*674] "The cost price of the sulphate delivered at Paris may be fairly calculated not to exceed 60 fr. (2*l.* 8*s.*) per

ton, making per 1000 tons 2,400

"Leaving a net monthly profit of 1,400

"Or, per annum £16,800

"To this amount must be added the profits to be derived from sales in Belgium, England, and other countries.

"These mines belong to, and are at present worked by, an association of partners 'en commandite,' who hold shares amounting together to the sum of 1,700,000 fr., or 68,000*l.*, which amount they are desirous of not reducing; and the following arrangement has, in conformity with this desire, been made for the purchase and working these mines on an adequate scale to meet the immense demand for this mineral.

"The council of this company have accordingly purchased one-half of the interest in these mines, for the payment of which, and to provide ample working capital for the extended operations, a sum of 84,000*l.* will be required; and the council propose raising the sum of 84,000*l.* by the issue of 68,000 shares of 1*l.* (25 fr.) each, being an equal number and value of shares as those to be held by the members of the original association, to represent their half of their interest in these mines: which 68,000 shares of 1*l.* each will, however, be issued at the price of 10*s.*, instead of 1*l.*, thus entitling the holders to half the profits of the entire mines, at the actual cost of only a quarter of the capital; which half profits upon the sales to be effected in Paris alone, will, as already shown, amount to 8400*l.* per annum, and give a yearly dividend

of nearly 25 per cent., independent of the profits to be obtained from sales in the Belgian, English, and other markets.

*675] “The gentlemen composing the former association have deposited, as proof of their good faith, with the London bankers of this society the sum of 250*l.*, to cover the preliminary expenses incurred in getting up the present company, and sending a competent party to examine the mines; so that, in the event of any failure, the council are enabled to guaranty the return of all deposits in full, without any deduction for preliminary expenses.

“20,000 having been already subscribed for in Belgium, the council will only have it in their power to issue 40,000 of these shares to the English public.

“For prospectuses, and letters of application, apply to Messrs. Eykyn, Brothers, 22, Change Alley, or the offices of the company, 70, King William Street, City.”

Then followed a report of Professor Ansted, who had been employed by the directors to visit and inspect the mines, and a form of application for shares, as follows:—

“Form of application for shares.

“To the council of management of the Royal Nassau Sulphate of Barytes Mines.

“Gentlemen,—I request you will allot me ——— shares of 1*l.* each (fully paid up) in The Royal Nassau Sulphate of Barytes Mines, Société Anglo-Belgique. And I undertake to pay 10*s.* per share on the above, or any less number that you may allot me.

(Name, date, &c.)

“To Messrs. Eykyn, Brothers,

“22, Change Alley.”

The plaintiff then called as a witness one Benjamin Naylor, who deposed as follows:—“I knew Mr. Lee, the secretary of the mine, and assisted him. The offices were at 7, King William Street. I attended daily for some months before the company were established. About November. I saw gentlemen there frequently. Mr. Best and Mr. *676] Clarke (meaning two of the *defendants) almost daily. I saw Mr. Sperling (meaning another of the defendants) frequently. They were discussing matters of business, in the board-room. It was customary to send letters to the directors. We gave letters to the boy. The first time I saw Drouet,—I do not recollect the time,—he pushed at the front room: I said, ‘You can’t enter, because the directors are sitting:’ he said, ‘I am one of the directors; my name is Drouet.’ The prospectus lay on the table of the office. I do not remember when I first saw a prospectus. [Prospectus put in.] I saw the defendant take some of the prospectuses, to circulate amongst his acquaintances. Mr. Clarke was sent to Belgium. I heard Drouet urge Captain Clarke to go to Belgium. He was to go and pay a sum of

money in Belgium. Lee had a name-book, in which the names were entered. I do not know if minutes were kept. I have seen the book ; but do not know where it is. I have seen Mr. Drouet there about ten or twelve times : twice at least in the directors' room. I never heard him say his name was in the prospectus without his authority. I do not know whether there ever was a deed establishing a company. I was in the room when the defendant Clarke started to go ; and also when he returned. I know M. Teinturier of Brussels. He made an advance for preliminary expenses."

On cross-examination, he said,—“I do not remember that I saw Sperling there after Clarke left for Belgium. I saw Best and Sperling there after the prospectus was published. The office finally closed about June, 1853. The name-book was kept by the boy.”

The plaintiff further proved that he was the holder of five hundred shares in the said company, and that he held scrip signed by the defendants Sperling and Clarke, and countersigned by Lee, the acting secretary of the company, whose duty it was, as such secretary, to *distribute such shares. The plaintiff also proved that he paid [*677 250*l.* as a deposit in respect of the said shares to Messrs. Martin, Stone, & Co., the bankers of the company mentioned in the said prospectus.

The plaintiff further produced and offered to give in evidence an entry in a book purporting to be a pass-book with the said bankers of the said society mentioned in the said prospectus, and which had been seen by and in the hands of Sperling, one of the defendants, at the office of the society, and which with the other books of the said company were delivered to Mr. Dolman, the solicitor of the company, when the company was broken up ; which entry was as follows :—

“John Stratford Best, George Noel Clarke, A. Drouet, W. H. Sperling, the council in London of the Royal Nassau Sulphate of Barytes Mines.

“Jan. 8.	Cash	.	.	.	.	£150	0	0
“ 18.	“	.	.	.	.	100	0	0
“ 12.	“	.	.	.	.	125	0	0”

The counsel for the defendant Drouet then objected to the admissibility of the said entry as evidence against him : but the Lord Chief Justice then admitted the same, as being evidence against Sperling, and therefore admissible in evidence in this cause.

It was further proved that many checks on the said bankers, signed by several of the said directors (not by Drouet) had been cashed by the said bankers, and were debited against them in the said pass-book.

The plaintiff further proved, that the establishment of the said company in London was not prosecuted within the terms of the said prospectus, and that it was broken up before action in London : but there was no proof that the formation of the company in Belgium had been abandoned.

The plaintiff also called a witness named Eykyn, stock-broker to the company, who stated as follows:—*“I was there about three
*678] times. I saw Mr. Lee, Mr. Clarke, and Mr. Sperling. I always saw the same people. He(a) requested them to return his money; as he did not consider they were justified in going on with insufficient capital. They agreed to return the money,—Lee, Clarke, and Sperling.”

The plaintiff sought to recover his said payment, as upon a failure of consideration.

The defendant Drouet gave in evidence as follows:—“M. Delfosse applied to me to be a director, and I refused. I never consented to be a director. I saw Lee at Brussels, and said I would not be a director. In consequence of seeing something in The Times, I saw Lee, and said I never authorized him to put my name; and I wanted it expunged. I went to the offices, and said it was against my will. He said he did not consider me as a director after M. Delfosse's letter. M. Teinturier advanced 250*l.* to the company. I went to the board for that money. I never said I was a director, or anything to that effect. I never knew of the money paid, and did not know they were the bankers. I never gave any authority to use my name, or acted for the company. I never saw any prospectuses in my life. On the 22d of May, 1853, I wrote to Lee.”

On cross-examination, he said,—“I wrote the letter, and showed it to a friend. I came to London in December, 1852, and in eight or ten days after I went to the company. I was there a short time. I knew Mr. George Clarke. I met him twice. I did not take any part in the deliberations of the directors there. Clarke said he had tried to rig the market with shares, and they had lost 700*l.* or 800*l.* I do not recollect Clarke wishing to go to Belgium. I heard afterwards of his
*679] going there with a sum of money. I was not offered 800 shares to *induce me to become a director. I do not know that I had 1000 shares allotted to me; and the secretary did not say so. I did not offer to pay 100*l.*, 200*l.*, or any proportion of the losses. The action was brought when I was in Belgium. I never saw my name but once in The Times.”

The defendant Drouet further gave in evidence, that, by the law of Belgium, this action was not maintainable.

On the part of the plaintiff, it was insisted that the evidence given on his behalf was sufficient to show that the money of the plaintiff had come to the hands of the defendant or his agent, and to sustain the issue.

On the other hand, it was submitted, on behalf of the defendant Drouet, that there was no evidence for the jury.

The learned judge ruled that the plaintiff's evidence, if believed, was

(a) Meaning, it is presumed, the plaintiff.

sufficient to show that the money in question was money had and received by the defendant, or his agent, to the plaintiff's use.

To this ruling the defendant Drouet excepted. The exceptions now came on for argument in the Exchequer Chamber, before Alderson, B., Coleridge, J., Platt, B., Martin, B., and Crompton, J.

Willes, for the plaintiff in error.—There was no evidence for the jury upon the issue joined. Nothing can be more loose and unsatisfactory than the evidence by which it is sought to fix Drouet. There was no evidence that he had any interest in the concern; nothing to fix the period when either of the persons named became directors. The witness Naylor, the assistant secretary, proved no entry in any book; there was no evidence that any minutes existed. It did not appear when Drouet attended at the office of the company, or when he saw the prospectus, or when the money was *paid in to the bankers',—except from [*680 the pass-book, which, though evidence against Sperling, who alone was proved to have seen it, was no evidence against Drouet; nor was the money entered in the pass-book in any way identified as the 250*l.* said to have been paid in by the plaintiff. Three sums are mentioned; but it is not stated by whom they were paid in. [MARTIN, B.—Naylor's evidence is all that can affect Drouet. COLERIDGE, J.—The plaintiff does not even fix the time when he paid the money to Martin, Stone, & Co.'s. ALDERSON, B.—I think we should hear what Mr. Pearson relies upon to show Drouet liable.]

Pearson, contra.—Naylor proved that, in November,—meaning, of course, the November after the publication of the prospectus, which had been previously put in,—Drouet, who was named in the prospectus as one of the "council in London" of this company, was frequently at the offices in King William Street, in the board-room, acting as a director; that the prospectuses (containing his name) were lying about on the table of the office; and that he saw Drouet take some of them to circulate amongst his acquaintances. Then, the pass-book of the company with Martin, Stone, & Co., the bankers named in the prospectus, was put in, containing the name of Drouet as one of the parties with whom the account at the bankers' was opened; and, though there was no direct proof that Drouet ever saw this book, there was evidence whence the jury were at liberty to infer that he knew of its existence. *Burnside v. Dayrell*, 3 Exch. 224,† is very distinguishable from the present case. Pollock, C. B., there says: "It may be assumed that there was such an entire failure of consideration as entitled the plaintiff to recover back his deposit from some one; and the only question is, whether the defendant is one of the parties liable to refund that *deposit. We think that he is not. He can only be liable [*681 because he was the person, or one of the persons, to whom the deposit was paid. There was no evidence that such was the case in the present instance. The defendant never acted at all, except by once attending a meeting as chairman, on the 3d of November, and by concur-

ring in the circulation of the prospectus. The attendance on the 3d of November has nothing to do with this part of the case: the prospectus only points out the course to be pursued by the parties desirous of getting shares, viz. by application to the provisional committee. If, acting on this, the plaintiff applied to A., B., and C., three members of the provisional committee, and deposited the money with them, this might bind the defendant to permit the plaintiff to be a member of the company when formed, but it does not make the defendant liable for money not paid to him, when the project has failed. The plaintiff must recover back his money from the parties to whom it was paid. Although the money was paid to the bankers named in the prospectus, it was not paid to the use of the defendant, nor was there any proof that the defendant ever received or could have received any part of it. *There was no evidence that he was one of the persons in whose name the account was opened with the bank where the money was kept.*" Here, however, there was such evidence. *Watson v. Earl Charlemont*, 12 Q. B. 856 (E. C. L. R. vol. 64), is also distinguishable. [MARTIN, B.—I think that case goes the whole length of this. It was assumpsit against the Earl of Charlemont, Hamilton, and Young, for money had and received. The plaintiff's case was, that the defendants were members of the committee of management of a registered railway company, to which company he had paid the money in question, as a deposit on shares; and that, before *682] he so paid, and while the defendants were committee-men, a false *representation as to the state of the company had been publicly advertised in the name of the committee. The only evidence of the receipt of the money, was, the payment to the bankers appointed by the committee, who gave a receipt on behalf of five trustees, of whom Hamilton was one, but not either the Earl of Charlemont or Young: and it was held that the action would not lie.] *Ashpítel v. Sercombe*, 5 Exch. 147,† is an authority to show that the pass-book was under the circumstances evidence against Drouet. There was quite as much evidence in this case against Drouet as was held sufficient to fix the defendant in the case of *Walstab v. Spottiswoode*, 15 M. & W. 501.† There, a railway company was provisionally registered, and a prospectus was issued, which stated the proposed capital to be 2,000,000*l.*, in 80,000 shares of 25*l.* each. The plaintiff applied to the provisional committee for seventy shares, in a letter whereby she undertook to accept the same or any less number they might allot to her, to pay the deposit of 2*l.* 12*s.* 6*d.* per share thereupon, and to sign the parliamentary contract and subscribers' agreement when required. To this letter she received an answer, signed by the secretary, stating that the committee of management had allotted her thirty shares, and requesting her to pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of certain banks, on or before a day mentioned. The plaintiff accordingly paid into one of those banks, in due time, the deposit of 78*l.* 15*s.*, and received the bankers' receipt for the same. She after-

wards presented the receipt to the company, and made many fruitless applications to the committee for scrip, and at length was informed that the directors had come to the resolution not to issue any scrip, and that the greater part of the deposits had been expended, and the balance would be rateably divided. It appeared that the directors, *finding it impossible to go to parliament in the ensuing session, had determined not to issue any scrip; and that, of the entire number of 80,000 shares, 70,000 were allotted, but deposits were paid on 4000 only, producing altogether the sum of 10,500*l*. In an action by the plaintiff to recover back, from a member of the managing committee, the sum of 78*l*. 15*s*. so paid by her as deposits on the shares allotted to her,—it was held, that there was sufficient evidence of the final abandonment of the project; and that, on its abandonment, under the circumstances above stated, the plaintiff was entitled to recover back, as money had and received to her use, the whole sum so paid by her. So, in *Bailey v. Macaulay*, 13 Q. B. 815 (E. C. L. R. vol. 66), it was laid down, that, in an action against a member of a committee of a projected railway company for work and labour, goods supplied, and money paid, the jury are to consider whether the defendant, by taking upon him the character of a committee-man, and afterwards acting in the affairs of the company, has authorized the company's solicitor or secretary, or any member of the committee, to hold him out to the world as personally responsible for the reasonable and necessary expenses incurred in forming such a company, and on its behalf; and, then, whether the credit was given on the faith of his being so personally responsible. [ALDERSON, B.—The question is, whether Drouet was a director of this company. There really was nothing to go to the jury. It entirely turns on Naylor's evidence.] And the pass-book. [ALDERSON, B.—The pass-book was no evidence against Drouet. CROMPTON, J.—There was no evidence that Drouet was a director, or had anything to do with the company, at the time the 250*l*. was paid to Martin, Stone, & Co. There was no evidence when the money was paid in.] It is clear that the whole took place in November, 1852. If the omission of the year creates any obscurity, the *bill of exceptions may be amended, under the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 222. [*684 [PLATT, B.—You surely cannot be serious.] It is submitted, in the language of the ruling of the Lord Chief Justice, that, if the evidence given on the part of the plaintiff was believed, there was sufficient evidence that the plaintiff's money had come to the hands of the defendant, or his agent, to sustain the issue. [ERLE, J.—There was no evidence that Martin, Stone, & Co. put Drouet's name down as party to the account with them, with his authority, or that he had subsequently sanctioned it.]

ALDERSON, B.—There clearly must be a *venire de novo*.

The whole court concurring,

Venire de novo.

PARR v. JEWELL. *June 13.*

The 68th rule of Hilary Term, 1853, which requires the error-books to be delivered to the judges "four clear days before the day appointed for argument," refers to the day of actual argument, and not to the second day of term, when the judges meet to appoint the days for argument.

It is a good defence to an action by endorsee against the acceptor of a bill of exchange, that it was accepted for the accommodation of the drawer, without consideration, and that it was endorsed over by the drawer after it had been paid by him at its maturity.

The 78th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, in effect extends the doctrine of *Cousins v. Paddon*, 2 C. M. & R. 547,† to all descriptions of pleadings.

THIS was an action upon a promissory note for 60*l.* drawn by the defendant below on the 22d of August, 1848, payable to the order of James Frederick Allen two months after date, and endorsed by Allen to the plaintiff below; and on two bills of exchange for 100*l.* each respectively drawn by Allen upon and accepted by the defendant below, on the 18th of December, 1848, and the 30th of November, 1849, payable three months after date to the order of Allen, and endorsed by him to the plaintiff below.

*The defendant pleaded,—first, that the said note was made, *685] and the said several bills were and each of them was accepted, for the accommodation of Allen, and that there never was any value or consideration for such making, or for either of the said acceptances, or for the payment by the defendant of any part of the moneys in the said instruments mentioned, and that there never was any value or consideration for either of the said several endorsements to the plaintiff, and that the plaintiff always held, and still holds, each of the said instruments without any value or consideration.

Secondly, that the said note was made, and each of the said bills was accepted, before the same respectively became due or payable according to its tenor, to wit, each of the said instruments was made and accepted on the day of its date, at the request and for the accommodation of Allen, to enable him to raise money thereon, or endorse the same for his own use and benefit before the same should become due and payable, and not otherwise; and that there never was any value or consideration for such making or acceptance, or for the payment by the defendant of any part of the moneys in the said several instruments mentioned, except as aforesaid; and that Allen negotiated each of the said several instruments for his own use and benefit, according to the said terms, and paid it when due, and the same was then delivered to Allen by the then holder thereof, fully paid, satisfied, and discharged; and that Allen afterwards, and after the said several instruments respectively had been so paid, and when each of them was overdue according to the tenor thereof, without the authority of the defendant, endorsed the said several instruments respectively to the plaintiff, contrary to the form of the statute in such case made, neither of the same having been re-stamped after such payment as aforesaid.

*Thirdly, that one James Frederick Allen, deceased, was the payee of the said promissory note, and that the same person was [686 the maker, payee, and endorser of the said several bills of exchange, and that the said note was made by the defendant, and delivered by him the defendant so made to the said J. F. Allen, long before the period therein mentioned for its payment had elapsed, to wit, on the day of its date; and that each of the said bills respectively was accepted by the defendant, and was delivered by him so accepted to the said J. F. Allen, long before the period therein mentioned for its payment had elapsed, to wit, on the day of its date; and that the said note was so made and delivered, and each of the said bills was so accepted and delivered to the said J. F. Allen, for the accommodation of the said J. F. Allen, and upon the special terms and purposes and understandings agreed to between the defendant and the said J. F. Allen, that the said J. F. Allen should be at liberty to negotiate each of the said instruments at any time before it became due, and that he should in such case take up the same when due, and protect the defendant from the payment thereof, but he should not negotiate either of the said instruments, or pledge the defendant's credit thereon, after the period therein mentioned for the payment thereof, and that the said J. F. Allen should when each of the said instruments became due, or within a day or two afterwards, either deliver up the same to the defendant, cancelled, or should cancel and destroy the same; that there never was any value or consideration for the making by the defendant of the said promissory note, or for the acceptance by the defendant of either of the said bills, or for the payment by the defendant of any part of the moneys in the said instruments mentioned, and that the said J. F. Allen always held each of the said instruments respectively upon the terms and purpose and *understanding aforesaid, and without value or consideration; that [687 the said J. F. Allen did not negotiate either of the said instruments at any time before either of them became due, nor did he, when the same became due, or within a day or two afterwards, deliver up the same, or either of them, to the defendant to be cancelled, nor did he cancel the same, but he continued to hold each and all of the said instruments from the time when the defendant made and accepted the same as aforesaid until the same were endorsed by him as thereafter mentioned, and from the time when each of the said instruments became due, and when the said J. F. Allen ought to have either delivered the same to the defendant to be cancelled, or to have cancelled the same, he held the same without the consent and against the will of the defendant, and in fraud of him, and he had never any authority whatever from the defendant to negotiate or part with either of the said instruments, except to the defendant for the purpose aforesaid, after the same had become due and payable according to its tenor; that, long after the periods in each and all of the said instruments respectively mentioned

for the payment thereof respectively had elapsed, and long after the time for cancelling the same respectively had elapsed, to wit, on the 6th day of March, 1853, the said J. F. Allen, then holding the same respectively, contrary to the said special terms, purpose, and understanding, and in fraud of the defendant, and without his authority, endorsed the same respectively to the plaintiff without the consent, knowledge, or authority, and in fraud of the defendant, and contrary to the special terms, purpose, and understanding; that the plaintiff then, and not before, and under the circumstances aforesaid, and not otherwise, became the holder and endorsee of the said several instruments respectively; and that the plaintiff, before and when he so became the holder *688] and endorsee of the said several *instruments respectively, had notice of the several premises in that plea aforesaid, and took the same several instruments respectively from the said J. F. Allen with such notice.

Fourthly, that the defendant made the said promissory note, and accepted the said several bills, and delivered the same respectively to Allen for his accommodation, and that there never was any value or consideration for such making, acceptances, or deliveries respectively, or for the payment by the defendant of any part of the moneys in the said note and bills mentioned, and that Allen always held the same respectively without value or consideration; that the said several instruments respectively were endorsed by Allen at the same time, to wit, on the 6th of March, 1853, as a security by Allen to the plaintiff for the moneys then due from Allen to the plaintiff, and that there never was any(a) value or consideration for such endorsements, or for any or either of them, or for the plaintiff holding the same; that, at the time when the said several instruments were endorsed by Allen to the plaintiff, and at the time of the payment thereafter mentioned, a much less sum than 275*l.* was due from Allen to the plaintiff, to wit, 180*l.*, and that, after such several endorsements, and long after the said several instruments had become due, the defendant satisfied and discharged all the debt and moneys due from Allen to the plaintiff, and all claim of the plaintiff on the said several instruments, by payment to the plaintiff of a much larger sum of money than the amount of the said moneys and claim, to wit, by payment of 275*l.*, the same being the amount of three several bills of exchange which the plaintiff(b) had in like manner accepted for the accommodation of Allen, and without value or consideration, and which had been endorsed by Allen to the plaintiff as securities for and in consideration of the same debt, money, and claim *689] for which the said several *instruments in the declaration mentioned had been endorsed, and without other value or consideration, and which the plaintiff held upon, for, and as such value and con-

(a) *Quare*, "other."

(b) *Sic*.

sideration and security only, and not otherwise, and upon which he had no other claim than the said debt and moneys to secure which the several instruments in the declaration mentioned were endorsed.

Fifthly, that the said several instruments were, and each of them was, payable to the order of James Frederick Allen, now deceased, and that he wrote his name on the back of the said several instruments respectively, but retained the same respectively in his own possession, and had not before or at the time of his death transferred either of the said instruments; that, after the death of Allen, the same were wrongfully and unlawfully taken,—the same then being the instruments and papers which were of the said J. F. Allen at the time of his death,—and were delivered to the plaintiff, the name of the said J. F. Allen being written on the back thereof respectively; which were the supposed endorsements to the plaintiff in the declaration mentioned; and that, at the time when the same were so taken and delivered to the plaintiff, there was no executor or other personal representative of the said J. F. Allen; and that the plaintiff, before and when the said several instruments were delivered to him, had notice of the said several premises, and took the same with such notice.

Sixthly, that the said several instruments were, and each of them was, payable to the order of J. F. Allen, now deceased, and that he wrote his name on the back of the said several instruments respectively, but retained the same in his own possession without transferring the same to any person, and that, in his lifetime, the same were wrongfully and unlawfully, and without his knowledge or consent, and whilst they were his property, taken out of his possession, and delivered to the plaintiff,* the name of the said J. F. Allen being written on the back of each of the said several instruments respectively; which were the several supposed endorsements to the plaintiff in the declaration mentioned; and that the said J. F. Allen never consented to or authorized the said transfer, or any transfer, of the said instruments, or of any or either of them, nor did he ever authorize or consent to the plaintiff holding the same, or any or either of them; and that the plaintiff, before and when the said several instruments were delivered to him, had notice of the said several premises, and took the same with such notice. [*690]

Upon each of these pleas issue was joined.

The cause was tried before Maule, J., at the second sitting in London in Easter Term, 1854, when the following evidence was given on behalf of the defendant:—

That the promissory note and bills in the declaration mentioned were made and accepted by the defendant for the accommodation of Allen, and without value or consideration; that no demand was ever made by the plaintiff or any other person upon the defendant in respect of the said note or bills before October, 1853; that the defendant had

accepted for Allen's accommodation two other bills drawn by Allen upon him, one on the 4th of March, 1851, for 50*l.*, and the other on the 5th of May, 1851, for 75*l.* 14*s.* 6*d.*, payable to Allen's order three months after the respective dates thereof; that, on the 25th of May, 1852, the defendant received two letters from one Ellaby, the attorney for the plaintiff in the present action, requiring payment on behalf of the plaintiff of the said two last-mentioned bills, and he instructed one Rowlatt, an attorney, to act on his behalf; and that Rowlatt saw Ellaby shortly after such applications for payment, and told him that the defendant had received no consideration for the last-mentioned bills, and had accepted them for the accommodation of Allen, *691] and that Ellaby stated that the plaintiff was the holder for value; that, in June, 1852, two separate actions were commenced by the plaintiff's present attorney, on behalf of the plaintiff, against the defendant, upon the said two last-mentioned bills, the declarations therein alleging that the said bills were respectively endorsed by Allen to one Percivall, and by Percivall to the plaintiff; that Rowlatt again saw Ellaby relative to the said last-mentioned bills and the actions upon them, and finally arranged them by giving on the 10th of July in the year last aforesaid, two judges' orders in the said actions respectively, for the payment of the debt and costs in the said respective actions by monthly instalments of 6*l.* a month; that afterwards, the defendant having won by horse-racing a large sum of money exceeding 10,000*l.*, shortly after giving the said judges' orders Rowlatt, by the defendant's instructions, paid the first instalments on the said respective orders, and the defendant in October, 1852, saw the plaintiff's attorney Ellaby, and paid him the remaining instalments on the said judge's orders, and received from him the last-mentioned two bills; that the defendant on that occasion told Ellaby that he the defendant had already paid a great deal of money for Allen; that the said two last-mentioned bills, which were then produced by the defendant before the jury, were then in the same state in which he received them from Ellaby, and had then upon them the several endorsements which they respectively had upon them at the time when they were so produced before the jury; that the said bill for 50*l.* so produced as aforesaid had endorsed upon it the several names following, that is to say, "J. F. Allen," "William Percivall," "W. H. Jewell," "E. H. Hoskins," "Pedders & Co.," "Cunliffes & Co.," "Jones & Co.," "Rec^d pr. Jones & Co., J. Barnett;" that the said bill for 75*l.* 14*s.* 6*d.* so produced as aforesaid, had endorsed upon *692] it the several names following, *that is to say, "J. F. Allen," "William Percivall," "W. H. Jewell," "Rec^d, London and County Bank, E. L. Wormell."

That the said bill for 50*l.* was at the time when it became due in the hands and possession of certain bankers carrying on business under the names of Jones, Lloyd, & Co., as the holders thereof, and that the said

last-mentioned bill was duly paid on the day when it became due, to the said bankers, as the then holders thereof, but that the said bankers did not know by whom such payment was so made.

That the said bill for 75*l.* 14*s.* 6*d.* was, at the time when it became due, in the hands and possession of a certain banking company called The London and County Bank, as the holders thereof, and that the said last-mentioned bill, on the day when it became due, was presented to the London and Westminster Bank, where the same was made payable according to the acceptance thereof, and was refused payment, but that afterwards, on the same day, it was paid and taken up at the said London and County Bank by a person not known to them.

That the defendant had also accepted for Allen's accommodation the three bills of exchange next hereinafter mentioned, that is to say, a bill dated the 12th of June, 1848, drawn by Allen, upon him the defendant, for 100*l.*, and payable to Allen's order three months after date; another bill dated the 23d of June, 1849, also drawn by Allen upon him the defendant, for 100*l.*, and payable to Allen's order three months after date; and another bill dated the 29th of December, 1849, also drawn by Allen upon him the defendant, for 75*l.*, and payable to Allen's order three months after date.

That he, the defendant, had heard nothing of the said three last-mentioned bills from the several times of accepting the same until the 6th of March, 1853, when he *received three separate letters [693 from Ellaby, applying for payment of the said three last-mentioned bills of exchange, which letters only varied from each other in stating the dates and sums of the said respective bills, but none of the said letters stated who was or claimed to be the holder of the said last-mentioned bills, or any of them, or by whose instructions the said letters were written.

That, on the receipt of the said three letters, the defendant handed them over to his attorney, Mr. Robson, who thereupon instructed his clerk (Jenkins) to call on Ellaby respecting the three last-mentioned bills; and that, on the 7th of March, 1853, Jenkins did accordingly call upon and see Ellaby, and inquired who was the holder of the said three last-mentioned bills, and was then informed by him that the plaintiff was the holder of two of them, and that he believed a Mr. Ramage was the holder of the third bill; and that, upon Jenkins asking where he resided, Ellaby declined to give him any further information, and said, that, if he brought an action, the defendant's attorney could obtain the particulars in the usual way.

That, on the 8th of March, 1853, the defendant's attorney (Robson) sent Ellaby a letter stating that he had received the defendant's instructions to resist the scandalous demands made on him by the pretended holder of the bills mentioned in the said three letters of Ellaby, and that he (Robson) would appear to any process for the defendant.

That Allen died on the 15th of March, 1858, and that, on the same day, three separate actions in the Court of Common Pleas were commenced at the suit of the plaintiff, by Ellaby as his attorney, against the now defendant, to recover the amount of the said three last-mentioned bills,—each of the said bills being the subject of a separate *694] action,—and in which actions respectively *the plaintiff declared thereon respectively as the endorsee of Allen.

That the said three last-mentioned actions were defended by the now defendant, and that, issues being joined on the pleas pleaded respectively therein, the same actions were set down for trial, and came on to be tried at the sittings for Middlesex in May, 1858; and that one of the said actions was tried, and a verdict obtained thereon for the defendant, leave being given to move the Court of Common Pleas to enter a verdict for the plaintiff, if the court should be of opinion that there was no evidence to go to the jury in support of the said verdict; and that, upon such trial, it was agreed that the said other two actions should abide the event of the first.

That, the Court of Common Pleas having been of opinion that there was no evidence to go to the jury in support of the said verdict in the said last-mentioned action, a verdict therein was entered for the plaintiff, and the defendant, by his attorney (Robson), in June, 1858, paid to Ellaby, on behalf of the plaintiff, the amount of the three last-mentioned bills of exchange so sought to be recovered in the said three last-mentioned actions, and also the costs, and received from him the said three last-mentioned bills; and that Ellaby did not then, nor had he at any time before given any notice or information that the plaintiff claimed to be the holder of any other bills of exchange or negotiable securities on which the defendant was alleged to be liable.

That, in October, 1853, Ellaby, on the part of the plaintiff, for the first time informed the defendant's attorney (Robson) that the plaintiff was the holder of the promissory note and bills of exchange mentioned in the declaration in this action, and applied for payment thereof, stating that probably the plaintiff would take less than the full amount, to settle *695] the matter; and that *afterwards, in consequence of the defendant's refusal to pay the said last-mentioned promissory note and two bills of exchange, the present action was brought.

That the bill of exchange in the second count of the declaration mentioned had been endorsed and delivered by Allen on the 18th of December, 1848, to one Adolphe Laurier, and that the consideration of such endorsement was the delivery by Laurier to Allen of a bill of exchange bearing date the 15th of September in the year last aforesaid, drawn by Allen upon and accepted by the defendant, for 100*l.*, payable to the order of Allen three months after date, and which latter bill had been endorsed and delivered by Allen to Laurier on the 18th of September last aforesaid in renewal and in consideration of the delivery

up by Laurier to Allen of another bill of exchange bearing date the 12th of June in the year last aforesaid, drawn by Allen upon and accepted by the defendant, for 100*l.*, payable to the order of Allen, at three months after the date thereof, and which latter bill had been discounted by Laurier for Allen on the day of the date thereof, and then endorsed and delivered by Allen to Laurier.

That the last-mentioned bill was one of the said three bills upon which the said three actions had been brought on the 15th of March, 1853, by Ellaby as the attorney for the plaintiff against the now defendant as aforesaid, and upon which the plaintiff recovered as aforesaid, and which said three last-mentioned bills had been so paid as aforesaid by Robson on behalf of the defendant.

That Laurier, after he had received the said bill of exchange in the second count of the declaration in this action mentioned from Allen, and whilst it remained in his hands, had made and written thereon a note or memorandum of the day on which the said last-mentioned bill would become due, but that, since the last-mentioned bill had been out of the possession of Laurier, a pen *had been drawn through such [696 note or memorandum, and had rendered it indistinct, but so that Laurier could still trace a part of his said note or memorandum thereon.

That, upon the last-mentioned bill becoming due, Laurier gave up the same to Allen, and received in exchange or renewal thereof another bill, dated the 21st of March, 1849, drawn by Allen upon and accepted by the defendant, for 100*l.*, payable to the order of Allen, at three months after the date thereof; and that, on the 23d of June in the year last aforesaid, the last-mentioned bill was given up by Laurier to Allen, who, in exchange and renewal thereof, endorsed and delivered to Laurier another bill, dated the day and year last aforesaid, drawn by Allen upon and accepted by the defendant, for 100*l.*, payable to the order of Allen, at three months after the date thereof; and that, upon the last-mentioned bill becoming due, on the 26th of September, in the year last aforesaid, Laurier delivered up the last-mentioned bill to Allen, who, in exchange and renewal thereof, endorsed and delivered to Laurier another bill, dated the day and year last aforesaid, drawn by Allen upon and accepted by the defendant, for 100*l.*, payable to the order of Allen at three months after the date thereof; and that, when the last-mentioned bill of exchange became due, on the 29th of December, 1849, Laurier delivered up the last-mentioned bill to Allen, who then paid to Laurier the sum of 25*l.*, in cash, in part payment thereof, and endorsed and delivered to Allen, (a) in respect of the residue thereof, another bill, (b) dated the 29th of December, 1849, drawn by Allen upon and accepted by the defendant, and payable to the order of Allen three months after the date

(a) Meaning "Laurier."

(b) Not mentioning the amount.

thereof; and that, after the last-mentioned bill had become due, Laurier, on the 1st of April, 1850, delivered back the last-mentioned bill to *697] Allen, who, in exchange and renewal *thereof, endorsed and delivered to Allen another bill of exchange, bearing date the 1st of April, 1850, drawn by Allen upon and accepted by the defendant, for 75*l.*, payable to the order of Allen at three months after date.

That, on the 25th of April last aforesaid, Laurier discounted for Allen another bill, bearing date the 25th of April, 1850, drawn by Allen upon and accepted by one John Perry, and bearing the several endorsements of Allen and of the defendant, and which said last-mentioned bill was, on the day and year last aforesaid, delivered by Allen to Laurier; and that Laurier held the two last-mentioned bills until the times when they severally became due; and that, upon the same being respectively dishonoured, Laurier instructed his attorneys to commence legal proceedings against the several parties liable upon the said two last-mentioned bills; and that, after an action had been brought on the said two last-mentioned bills against the now defendant, he the defendant, by his attorney (Robson), on the 11th of July, 1851, paid the sum of 160*l.* to the attorneys of Laurier, for debt and costs in the last-mentioned action, and the same bills were then delivered up by the attorneys of Laurier to Robson for the defendant.

That Allen was for many years a clerk in the office of Messrs. Phillips & Voss, attorneys, but quitted that situation in the beginning of 1850, and had no other situation or known means of getting his livelihood from thence until the time of his death; and that from thence until the time of his death he was embarrassed in his circumstances; and that he was indebted to Mr. Phillips for money borrowed at various times, and some of it shortly before he left his employment, and had given him a bill of sale of his furniture and effects by way of security, *698] and which bill of sale the said *Mr. Phillips, after Allen's death, gave to his widow, as a present.

That Allen fell into ill health some time before his death, and was confined to the house for some months, and to his bed for a month or more before he died.

On the part of the defendant, it was submitted that the evidence above set forth was sufficient, and ought to be submitted to the jury in support of the several pleas, or one or each of them; and that, particularly as to the bill in the second count mentioned, there was evidence which was sufficient, and ought to be submitted to the jury, in support of the second plea, and that such plea might and ought to be taken distributively for that purpose.

But the learned judge ruled that the evidence so given by the defendant was not sufficient, and ought not to be submitted to the jury in support of the said several pleas, or any or either of them, and that the plaintiff was not bound, in answer to such evidence, to give any

proof of his having given value or consideration for the said promissory note and bills of exchange in the declaration mentioned: and he accordingly did not submit the said evidence to the jury in support of the said pleas, or any one of them, or call upon or require the plaintiff to give any evidence of his having given value or consideration for the said note and bills, or any or either of them: and, by his direction, the jury found against the defendant upon the issues joined on all the pleas.

Whereupon the counsel for the defendant, conceiving that by law the evidence so given by him was sufficient in law to be submitted to the jury in support of the said several pleas, or some or one of them, or at all events as to the second plea so far as it applied to the bill mentioned in the second count, and that the learned judge ought to have called upon the plaintiff in answer thereto *to prove that he had given value or consideration for the said promissory note and bills, or some or one of them, excepted to the opinion of the learned judge. [699

The exceptions came on for argument in the Exchequer Chamber on the 9th of May last, before Pollock, C. B., Parke, B., Alderson, B., Coleridge, J., Erle, J., Wightman, J., Platt, B., and Crompton, J.

Manisty (with whom was *V. Harcourt*), for the plaintiff in error.

Wood, for the defendant in error, objected to *Manisty's* being heard until his client had paid for the error-books delivered by the defendant in error upon his default. It appeared that the second day of term, on which the judges meet for the purpose of appointing the days for hearing arguments upon writs of error, was the 17th of April; that the attorney for the defendant in error had on the 11th delivered copies of the judgment-roll, in conformity with the rule of court of Hilary Term, 1853, r. 68,(a) to the judges of the Court of Exchequer; and that, finding that the plaintiff in error had not delivered his copies to the judges of the Court of Queen's Bench *on the 12th, the attorney for the defendant in error tendered copies to the judges' [700 clerks on the 13th, but they refused to receive them, on the ground that they were too late. He submitted,—stating that he was informed by the officer of the court that such was the practice,—that the rule required the copies to be delivered four clear days before the actual "error day," viz. the second day of term. [POLLOCK, C. B.—The error day is the day appointed for the argument. ALDERSON, B.—If

(a) Which provides that, "four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment-roll of the court below to the judges of the Queen's Bench, on error from the Common Pleas or Exchequer, and to the judges of the Common Pleas, on error from the Queen's Bench; and the defendant in error shall deliver copies thereof to the other judges of the Court of Exchequer Chamber before whom the case is to be heard; and, in default by either party, the other party may on the following day deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the master a sufficient sum to pay for such copies."

no case is set down on the second day of term, then there is no error day appointed.]

Manisty.—Kernot v. Pittis, 17 Jurist, 932, shows that the argument day is the day referred to by the 68th rule, and not the second day of term, when the judges meet to appoint the error days.

POLLOCK, C. B.—The judges meet on the second day of term merely for the purpose of appointing the days for hearing arguments. “Four clear days before the day appointed for argument,” therefore, means four clear days before the day upon which the argument has been appointed to take place.

Manisty.—The questions will arise mainly on the second plea to the second count, and on the first and fourth pleas. It appears from the evidence that the bills were accepted for the accommodation of Allen, and without consideration; and that the bills now sued upon had been satisfied by renewals, the last being in July, 1851. [PARKE, B.—Does it appear when the plaintiff became the holder of the bills now sued upon?] Only by inference. It is submitted that there was ample evidence to go to the jury, that the bills were accommodation bills, and were paid at maturity, and endorsed over by Allen after they had become due, and the stamp *thereon had been exhausted. Allen, as an accommodation
*701] drawer, stood in the position of an acceptor, and therefore could not re-issue the bills after payment. A bill that is taken up by an accommodation drawer at maturity has performed its functions, and ceases to be a negotiable instrument: Reynolds v. Doyle, 1 M. & G. 753 (E. C. L. R. vol. 39), 2 Scott, N. R. 45; Lazarus v. Cowie, 3 Q. B. 459 (E. C. L. R. vol. 43), 2 Gale & D. 487. Lord Denman, in this latter case, in delivering the judgment of the court, says: “It cannot be denied, that, if a bill be paid when due by the person ultimately liable upon it, it has done its work, and is no longer a negotiable instrument. No person could sue on it: no person remains liable on it. If put into circulation again, it becomes a new bill payable at sight, and must have a fresh stamp: stat. 55 G. 3, c. 184, s. 19; Holroyd v. Whitehead, 1 Marsh. 128 (E. C. L. R. vol. 4), 5 Taunt. 444 (E. C. L. R. vol. 1). If a bill, therefore, be paid when due, by the *acceptor*, it clearly cannot be re-issued without a fresh stamp: if so paid by the *drawer*, being also payee, it might, in ordinary cases, be re-issued without a fresh stamp: Callow v. Lawrence, 3 M. & Selw. 95. But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value: he is the person ultimately liable; and his payment discharges the bill altogether. It is said, however, that the stamp acts do not make a bill without a stamp void, but only forbid its being received in evidence. That may be so in some cases: but the 19th section of the 55 G. 3, c. 184, above mentioned, expressly prohibits the issuing a bill of exchange which has been paid, and inflicts a penalty of 50*l.* on any person doing it. A bill issued contrary to such prohi-

bition is certainly void." *Dillon v. Rimmer*, 1 Bingham 100 (E. C. L. R. vol. 8), 7 J. B. Moore, 427, *Kendrick v. Lomax*, 2 C. & J. 405,† and *Bartrum v. Caddy*, 9 Ad. & E. 275 (E. C. L. R. vol. 36), 1 P. & D. 207, are also authorities to show that a bill coming home at maturity cannot be re-issued. Wilde, C. J., in *delivering the judgment of the Exchequer Chamber in *Harmer v. Steele*, 4 Exch. 1, 13,† [*702 says: "There is no doubt, that, when a bill has been paid at maturity by a sole acceptor to a third person, who is the holder, no action can afterwards be brought upon the acceptance; and it is equally certain, that, if one of several joint acceptors pays the bill at maturity to such third person, being the holder, the contract of acceptance is performed, and no action can be maintained upon it. A case was put in argument: suppose there were three acceptors, one for the accommodation of the other two: he purchases the bill during its currency, and retains it after it is due; may he not endorse it, and give a right of action to his endorsee? We think the answer is, that he cannot give such right of action; that he may sue the other joint makers for what may be due to him in respect of his having accepted for their accommodation, and protected them from the payment of the bill, but that he cannot transfer this or any other right against the joint-acceptors, by endorsing the bill." [POLLOCK, C. B.—I think we should hear Mr. Wood upon this point. PARKE, B.—You contend that the plea is to be construed distributively. In *Cousins v. Paddon*, 2 C. M. & R. 547,† 5 Tyrwh. 585, 4 Dowl. P. C. 488, and *Tuck v. Tuck*, 5 M. & W. 109,† 7 Dowl. P. C. 373, we held that pleas of payment and set-off might be so construed.] The 75th section (a) of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, provides that *all* *pleadings capable of being construed distributively shall be so taken. [PARKE, B.—The effect [*703 of that section is, to extend the doctrine of *Cousins v. Paddon* to every sort of pleading.]

Wood, for the defendant in error.—The last proposition will not be denied. By the 157th section of the 15 & 16 Vict. c. 76, it is provided that "courts of error shall in all cases have power to give such judgment and award such process as the court from which error is brought ought to have done, without regard to the party alleging error." [PARKE, B., referred to *Pollitt v. Forrest*, 11 Q. B. 949, 962 (E. C. L. R. vol. 63).] The question, then, to be discussed, is, whether or not there was evidence to go to the jury in support of the issue tendered by the second plea to the second count. [POLLOCK, C. B.—It appears to me that there was evidence upon every one of the pleas, which was fit

(a) "Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively; and, if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered."

for the consideration of the jury.] If there be one material allegation in the plea as to which the evidence fails, the ruling of the learned judge was correct. [PARKE, B.—There must be evidence to go to the jury in support of every allegation which was material to constitute the plea a good plea.] The first material allegation in the second plea, is, that the bill was accepted for the accommodation of Allen, to enable him to raise money thereon, or endorse the same for his own use and benefit *before the same should become due and payable, and not otherwise*. Now, there certainly was evidence to show that the bill was accepted for the accommodation of Allen, but none to show any agreement or understanding that it was not to be endorsed after it became due. [PARKE, B.—Is not that a necessary consequence?] It is submitted not: the plea would be bad without it. In *Charles v. Marsden*, 1 Taunt. 224, it was held that it is not of itself a defence to an action by the endorsee of a bill of exchange *to plead that it was accepted for the accommodation

*704] of the drawer, without consideration, and that it was endorsed over after it became due. Mansfield, C. J., there says: "There is no allegation of fraud in this plea, nor any averment that the plaintiff did not give a valuable and full consideration for this bill: it must, therefore, be presumed that he did, and that there is no fraud in the transaction: he receives the bill from the proper hand which was entitled to have the possession of it, the person to whom it was payable. *It is not necessarily to be inferred, because it was an accommodation bill, that there was an agreement not to negotiate it after it became due*: but, if there was such an agreement, it was the defendant's own fault that the bill was outstanding; for, even supposing that the drawer had undertaken to provide for the payment when the bill became due, the acceptor had a right to require that it should be given up. It happened through his permission, therefore, if the bill gave the drawer any power to delude the endorsee." [POLLOCK, C. B.—The plea is a good plea without that allegation. It states that the bill was endorsed and negotiated and paid by Allen at maturity, and afterwards re-issued by him. PLATT, B.—The fact of its being an accommodation bill is evidence for a jury that it was given for the purpose of being used before it should become due.] In *Stein v. Yglesias*, 1 C. M. & R. 565,† 5 Tyrwh. 172, 3 Dowl. P. C. 252, and in *Sturtevant v. Forde*, 4 Scott, N. R. 668, 4 M. & G. 101 (E. C. L. R. vol. 43), pleas that the bills were accepted for the accommodation of the drawer, and without consideration, and endorsed to the plaintiff (in the latter case two years) after they became due, were held, on special demurrer, to afford no answer to actions against the acceptor. Tindal, C. J., in the latter case says,—“I do not see much force in the argument that the circumstance of the bill being overdue when it is endorsed puts the endorsee

*705] in the same position as the endorser, who, in the case of a bill drawn for his accommodation, cannot sue at all. I do not think

that the holder is precluded from suing in all cases of accommodation bills endorsed after the time at which they purport to be payable. Nothing dehors the bill, as, payment, &c., ought, I think, to affect an endorsee for value." [PLATT, B.—Here it is a question of *evidence*.(a)] The next material averment in this plea, is, that, Allen, having negotiated the bill, paid it when it became due, and afterwards re-issued it without the authority of the defendant, and without its being re-stamped. The distinction between *Lazarus v. Cowie*, 3 Q. B. 459 (E. C. L. R. vol. 48), 2 Gale & D. 487, and this case, is, that there the bill was *paid* at maturity,—money was given for it; and therefore the court held, that, inasmuch as the bill had been paid by the party ultimately liable upon it, it had done its duty, and the stamp was exhausted: whereas, here, there has been no *payment*: when the bill became due, another was given for it, and this bill, as between Allen and Parr, was kept back. A bill given in renewal of a former bill does not amount to payment, until the substituted bill is actually paid. If the defendant could have shown that the substituted bill was paid at its maturity, and that the original bill was endorsed and negotiated *after that payment*, he would have brought the case within *Lazarus v. Cowie*. In *Jewell v. Parr*, 13 C. B. 914 (E. C. L. R. vol. 76), Jervis, C. J., remarking upon *Lazarus v. Cowie*, says: "We must assume the plea to be a good one; though I am not prepared entirely to *concur in the decision the [*706 Court of Queen's Bench came to in that case. If the matter were re-considered, it might possibly be found to involve a fallacy." There is no statement in this bill of exceptions as to when the bill came into the possession of the plaintiff. All that is said, is, that, at the time of its maturity, it was given up to Allen. [CROMPTON, J.—There was evidence for the jury that the bill subsequently given was given in satisfaction of the original bill. The giving a new bill was held by the Common Pleas, in *Belshaw v. Bush*, 11 C. B. 191 (E. C. L. R. vol. 78), to be a conditional payment. WIGHTMAN, J.—This bill was given up to the person who gave the substituted bill. Was not that a circumstance to go to the jury that the latter was received in satisfaction of the former?] It is submitted that it was not. In *Callow v. Lawrence*, 8 M. & Selw. 95, Lord Ellenborough says: "A bill of exchange is negotiable *ad infinitum* until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill, and if, instead of suing the acceptor, he put it into circulation upon his own endorsement only, it does not prejudice any of the other parties who have endorsed the bill, that the holder should be at liberty to sue the acceptor." Does it make any differ-

(a) In *Sturtevant v. Forde*, Erskine, J., says: "The circumstance that the bill was overdue might have operated as evidence that the bill was an accommodation bill, but it should have been so averred. The jury might infer that the bill was accepted upon an understanding that it was not to be negotiated after it became due. But that would not be an inference of law; it should therefore have been made the subject of an averment."

ence in this respect that the bill is an accommodation bill? [WIGHTMAN, J.—When the drawer of an accommodation bill pays it, he takes it up for the acceptor, as well as for himself. PLATT, B.—In the case you cite, the bill had not got home. CROMPTON, J.—It would be very unreasonable to hold that an accommodation bill may be kept outstanding for an indefinite time, and circulated and paid over and over again.] It has been distinctly decided that one who takes a bill after it has become due, takes it with all its equities; and that its being an accommodation bill is not such an equity as attaches,—per Erskine, J., and Cresswell, J., *in *Sturtevant v. Forde*, 4 M. & G. 101 (E. C. L. R. vol. 43), *707]. 4 Scott, N. R. 668. [ERLE, J.—Was the bill there endorsed by the accommodation drawer after its maturity?] It is so stated in the report in Scott. *Heath v. Sansom*, 2 B. & Ad. 291 (E. C. L. R. vol. 22), is overruled by *Mills v. Barber*, 1 M. & W. 425.† [PARKE, B.—Only so far as it held that the plaintiff was bound to prove value.] In *Byles on Bills*, 6th edit. 129, it is said, “‘After a bill or note is due,’ says Lord Ellenborough, ‘it comes disgraced to the endorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the endorser, and subject to all the equities with which it may be encumbered.’” Thus, where the defendant made a promissory note for the accommodation of the payee, and the payee endorsed it, overdue, to A., and A. endorsed it to the plaintiff, it was formerly held, that, as the absence of consideration would have been a good defence against the payee, it was also available both against A. and the plaintiff: *Tinson v. Francis*, 1 Campb. 19; *Brown v. Davies*, 3 T. R. 80, 7 T. R. 429.” To this the learned author adds the following note,—“Sed vide *Charles v. Marsden*, 1 Taunt. 224; *Atwood v. Crowdie*, 1 Stark. N. P. C. 488 (E. C. L. R. vol. 2); *Bayley*, 6th edit. 161; *Chitty*, 9th edit. 218; *Roscoe*, 305. *Quære*, supposing it to have been accepted after it became due. See *Stein v. Yglesias*, 1 C. M. & R. 565,† 3 Dowl. P. C. 252, 1 Gale, 98. So stood the authorities till very lately. But the Court of Common Pleas, in *Sturtevant v. Forde*, and the Court of Queen’s Bench, in *Lazarus v. Cowie*, and perhaps the Court of Exchequer, in *Stein v. Yglesias*, have recently upheld the authority of *Charles v. Marsden*; and it should now seem that an original absence of consideration is not one of those equities which attach on the instrument and defeat the title of an endorsee for value of an overdue bill, although with notice of the fact. See **Carruthers v. West*, 11 Q. B. 148 (E. C. L. R. vol. *708] 63).” The text proceeds,—“It is now, however, clear, that an original absence of consideration, such as arises in the case of accommodation acceptances, will not defeat the title of an endorsee for value of an overdue bill or note, although the endorsee had notice of the fact when he took the bill, unless there were an agreement, express or implied, restraining the negotiation of the bill or note after it should

become due: *Sturtevant v. Forde*; *Lazarus v. Cowie*; *Stein v. Yglesias*. But the assignee of an overdue bill or note is not affected by an infirmity in the title of an original or antecedent party, if his immediate assignor could have maintained an action. A bill was accepted on a smuggling transaction, endorsed before it was due to a *bonâ fide* holder for value, and by the latter endorsed, after due, to the plaintiff: held, that, as the endorser might have sustained an action against the acceptor, so could his endorsee: *Chalmers v. Lanion*, 1 Campb. 388. An endorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters: therefore, the endorsee of an overdue note is not liable to a set-off due from the payee to the maker.^(a) Yet it should seem, that, where a negotiable instrument is deposited as a security for the balance of accounts, and is afterwards endorsed overdue, in an action by the endorsee against the party originally liable, the state of the account may be gone into: *Collenridge v. Farquharson*, 1 Stark. N. P. C. 259 (E. C. L. R. vol. 2).” [CROMPTON, J.—Is there any case where the doctrine you rely on has been applied to a bill which has been paid at its maturity?] It is submitted that there is no *evidence of *payment* here. [PARKE, B.—If the bill had been paid by the acceptor, there could have been been no doubt: and surely a payment by one who as between themselves is ultimately liable to pay the bill, must be the same thing. POLLOCK, C. B.—The fact of a bill being overdue calls for inquiry on the part of him who takes it. In *Brown v. Davies*, 3 T. R. 80, Buller, J., says: “There is this distinction between bills endorsed before and after they become due. If a note endorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on his [its] own intrinsic credit. But, if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. Still stronger ought that suspicion to be, when it appears on the face of the note to have been noted for non-payment; which was the case here. But, generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him: upon this ground it was, that, in the case in *Cornwall*,^(b) I held that the defendant, who was the maker, was entitled to set up the same defence that he might have done against the original payee; and the same doctrine has often been ruled at Guildhall. A fair endorsee can never be injured by this rule; for, if the transaction be a fair one, he will still be entitled to recover. But it may be a useful rule to detect fraud, whenever that has been practised.” Upon Lord Kenyon’s

(a) Citing *Burrough v. Moss*, 10 B. & C. 553 (E. C. L. R. vol. 21), 5 M. & R. 296,† *Stein v. Yglesias*, 1 C. M. & R. 565,† 3 Dowl. P. C. 252, 1 Gale, 98; *Goodall v. Ray*, 4 Dowl. P. C. 76; *Whitehead v. Walker*, 9 M. & W. 506.†

(b) *Banks v. Colwell*, Leamington Spring Assizes, 1788.

appearing to dissent from the generality of the doctrine held by Buller, J., he proceeded to observe,—“My Lord thinks I have gone rather too far in something that I have said; but it is to be observed that I am speaking of cases where the note has been endorsed after it become due, *710] when I consider it a note newly drawn by the *person endorsing it.” In fact, it is a disgraced bill. Anybody may take it from the holder; but he takes only the right which the holder had. ALDERSON, B.—There was evidence here that a new bill had been given in satisfaction of the bill in question. Is satisfaction by the accommodation drawer in law a satisfaction by the acceptor? The party who takes a bill under circumstances like these, takes it subject to all the equities attached to it. Was not its non-negotiability one of its equities? That might be so, if there was any evidence that the renewed bill was paid. In *Jewell v. Parr*, 13 C. B. 909, 914 (E. C. L. R. vol. 76), Jervis, C. J., says: “*Primâ facie*, the drawer of an accommodation bill is not the party to pay it: upon the face of the bill, the party who is bound to pay, is, the accommodation acceptor. It is true, he has a remedy over against the drawer; but, so far as regards the instrument itself, the acceptor is the person who is primarily liable to pay.” If that be so, the present argument is unanswerable. It is the acceptor’s own fault if he allows the bill to be out in the world after payment by the accommodation drawer. In *Fentum v. Pocock*, 5 Taunt. 192 (E. C. L. R. vol. 1), 1 Marsh. 14 (E. C. L. R. vol. 4), it was held, that, if the holder of an accommodation bill take a cognovit from the drawer, for payment by instalments, he does not thereby discharge the acceptor, whether at the time of taking it he knew that it was an accommodation bill or not,—overruling *Laxton v. Peat*, 2 Campb. 185, and *Collott v. Haigh*, 3 Campb. 281. Sir James Mansfield, in *Fentum v. Pocock*, said: “This case of *Laxton v. Peat* certainly is the first in which it was ever supposed that the acceptor of a bill of exchange was not the first person and the last person compellable to pay that bill to the holder of it, and that anything could discharge the acceptor except payment or a release: and I never before knew *711] that there was any difference between an *acceptance given for accommodation, and an acceptance for value.” [POLLOCK, C. B.—It is impossible to reconcile all the dicta upon this subject. As to all the world except the drawer and acceptor, no doubt, the acceptance is to be taken to be an acceptance for value: but the question is, whether there is not a difference where the bill is endorsed over by the drawer after it has become due.] What evidence is there that Parr gave any authority to take up the bill in question with the new bill? [POLLOCK, C. B.—The bill became due on the 21st of March, 1849, and was taken up by a bill drawn on that day, for the same sum, by Allen upon the defendant. That was evidence whence the jury might infer that the second bill was drawn for the purpose of taking up the first.

It clearly was some evidence of a contract or arrangement that the bill should not be negotiated after it became due.] The fact of the second bill being for the same amount as the first was no evidence that it was drawn for the purpose of taking up the first bill. [POLLOCK, C. B.—It was some evidence; and there is evidence that it was so applied.] There is no more evidence here than the Court of Common Pleas in *Jewell v. Parr* held to amount to mere suspicion or surmise.

There being a slight difference of opinion amongst the learned judges as to this point, the Lord Chief Baron intimated, that, before hearing *Manisty*, for the plaintiff in error, upon the other matters, the court would take a little time to consider; especially as the Court of Common Pleas, in *Jewell v. Parr*, did not quite assent to the doctrine of *Lazarus v. Cowie*, and as these cases had now for the first time been brought under the consideration of a court of error. Cur. adv. vult.

*ALDERSON, B., now delivered the judgment of the court.

The court are unanimously of opinion in this case,—and, after [*712 some little doubt at first entertained by one of its members,—that there should be a venire de novo. The case mainly relied on for the defendant in error was that of *Charles v. Marsden*, 1 Taunt. 224, where it was held, that it is not a defence to an action by the endorsee of a bill of exchange to plead that it was accepted for the accommodation of the drawer, without consideration, and was endorsed over after it became due. But, in that case, the question arose upon the pleadings: whereas, here it is presented upon the evidence. And we think, that, under the circumstances stated in this bill of exceptions, there was evidence for the jury of an engagement on the part of Allen not to negotiate the bill mentioned in the second count after it became due; therefore, without going further into the case, it is enough to say that there must be a venire de novo.

Venire de novo.

If the endorser of a promissory note proves that it was issued fraudulently by the maker, the holder may be called on to show what consideration he gave for it: *Holme v. Karsper*, 5 Binney, 469; *Thompson v. Armstrong*, 7 Alabama, 256; *Woodhull v. Holmes*, 10 Johns. 231; *Knight v. Pugh*, 4 Watts & Serg. 445; *Jarden v. Davis*, 5 Wharton, 338; *M'Clintock v. Cummins*, 2 M'Lean, 98. Fraud or want of consideration is no defence for either the maker or accommodation endorser of a promissory note, as against a bona fide holder for value, to whose possession it came before maturity in the due course

of trade—without notice; but, when a note was purchased under such circumstances at a discount, it will be held to have been negotiated in the way of trade only to the amount advanced by the purchaser: *Holeman v. Hobson*, 8 Humphery, 127.

Where a promissory note, endorsed by the payee for the accommodation of the maker, is negotiated by the latter in violation of an agreement between them, the holder cannot recover against such payee, unless he received the note in good faith, for a valuable consideration, and without notice of the arrangement: *Small v. Smith*, 1 Denio, 588.

Where, however, a note is passed by the maker, with the payee's endorsement upon it, it is not a transfer in the usual course of business, and the endorsee has not the commercial privileges of a holder without notice: 2 Barr, 103. An endorser of a note for the accommodation of the maker, and without consideration, and that fact known to the endorsee when he took the bill, is, notwithstanding, liable to the endorsee, and even if the endorsee takes the note after it is due: an overdue note, however, while he

takes it subject to the equities with which it is charged, cannot be affected by a set-off between the defendant and a previous endorser arising out of a distinct transaction: *Hughes v. Large*, 2 Barr, 103. An endorser of a note for the accommodation of the maker, and without consideration, and that fact known to the endorsee when he took the bill, is, notwithstanding, liable to the endorsee, and even if the endorsee takes the note after it is due: *Brown v. Mott*, 7 Johnson, 361.

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*IN THE HOUSE OF LORDS.

TRINITY VACATION, 1855.

HENRY UNWIN v. CHARLOTTE CATHERINE HEATH, Administratrix of JOSIAH MARSHALL HEATH, Deceased. July 31.

The plaintiff below obtained letters-patent for "improvements in the manufacture of iron and steel." In his specification, he declared his invention to be (amongst other things), "the use of carburet of manganese in any process whereby iron is converted into cast-steel;" and he described the process which he claimed thus:—"I do it, by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." He then stated that he did not claim the use of the mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention, but only the use of "carburet of manganese, in any process for converting iron into cast-steel."

The defendant below produced the same result,—a superior and more valuable description and quality of cast-steel,—as certainly, and more cheaply, by substituting for the carburet of manganese, its elements, viz., *oxide of manganese and coal-tar*, which, being put into the crucible with the iron, according to the evidence of chemists, would form "carburet of manganese" before the iron was in a state of fusion, and consequently before any combination therewith could take place.—

The judge told the jury that there was no evidence of infringement:—

Held,—reversing the judgment of the Exchequer Chamber, and contrary to the opinion of the majority of the common law judges,—that the ruling of the learned judge at the trial was correct.

THIS was an action upon the case for an alleged infringement of a patent.

The declaration stated that the plaintiff (below) Josiah Marshall Heath was the first and true inventor of certain improvements in the manufacture of iron and steel; that he, on the 5th of April, 1839, obtained a patent for his said invention; that he duly filed his specification on the 4th of October, 1839; and that the defendant (below), without his

leave or license, and against his will, infringed his said patent, &c., &c. The defendant pleaded,—first, not guilty.

Secondly,—that the plaintiff was not the first or true inventor of the said improvements in the declaration *mentioned, in manner and form as the plaintiff had above in that behalf alleged; concluding [*714 to the country.

Thirdly,—that the nature of the said invention in the declaration mentioned, and the manner in which the said invention was and is to be performed, were not nor are they particularly described or ascertained, according to the true intent and meaning of the said letters-patent, in or by the said specification in the declaration in that behalf mentioned, in manner and form as the plaintiff had in the declaration in that behalf alleged; concluding to the country.

Fourthly,—that the said invention in the declaration mentioned was not, at the time of making and granting the said letters-patent, a new invention, but, on the contrary thereof, had been wholly and in part publicly and generally practised, used, and vended, to wit, within that part of the united kingdom of Great Britain and Ireland called England, before the date and grant of the said letters-patent, to wit, on the 1st of January, 1820, and on divers other days between that day and the date and grant of the said letters-patent; by reason whereof the rights, liberties, privileges, benefits, monopolies, and advantages by the said letters-patent granted, and the prohibitions therein contained, were, at the time of the making and granting of the said letters-patent, and from thence hitherto had continued to be, and at the said several times when, &c., were, and still remained, wholly void and of no effect, and the same were wholly lost and forfeited to and by the plaintiff; wherefore the defendant, at the said several times when, &c., committed the said several grievances in the declaration mentioned, as he lawfully might for the cause aforesaid: verification.

Fifthly,—leave and license.

Replication, joining issue on the first, second, and third pleas, and traversing the fourth and fifth.

*The cause was tried before Cresswell, J., at the sittings at Westminster after Michaelmas Term, 1851. [*715

The plaintiff put in the specification, bearing date the 4th of October, 1837, and which was proved to have been duly filed and enrolled, as follows:—

“To all to whom these presents shall come, I, Josiah Marshall Heath, of, &c., send greeting: Whereas, her present most excellent Majesty Queen Victoria, by her royal letters-patent under the Great Seal of Great Britain, bearing date at Westminster, the 5th of April in the second year of her reign, 1839, did, for herself, her heirs and successors, give and grant unto me, the said Josiah Marshall Heath, her special license, full power, sole privilege, and authority, that I, the said

Josiah Marshall Heath, my executors, administrators, and assigns, and such others as I, the said Josiah Marshall Heath, my executors, administrators, or assigns, should at any time agree with, and no others, from time to time, and at all times during the term of years therein mentioned, should and lawfully might make, use, exercise, and vend within England, Wales, and the town of Berwick-upon-Tweed, my invention of certain improvements in the manufacture of iron and steel; in which said letters-patent is contained a proviso obliging me the said Josiah Marshall Heath, by an instrument in writing under my hand and seal, particularly to describe and ascertain the nature of my said invention, and in what manner the same is to be performed, and to cause the same to be enrolled in Her Majesty's High Court of Chancery within six calendar months next and immediately after the date of the said in part recited letters-patent,—as in and by the same, reference being thereunto had, will more fully and at large appear: Now, know ye, that, in compliance with the above proviso, I, the said Josiah Marshall Heath, do declare the nature of my said inventions to be,—first, *716] the extraction of pure **cast-iron* from certain ores of that metal, without the intervention of any earthy alkaline or saline matter, to form a vitreous flux, cinder, or slag,—secondly, the formation of cast-steel, by fusing the said pure cast-iron along with malleable iron, or certain metallic oxides, in such proportion as may decarburate the cast-iron to a certain degree, and by completing the decarburation in a suitable cementing furnace,—thirdly, the use of a certain portion of oxide of manganese in the process of converting cast-iron into malleable iron by the process of puddling,—and, fourthly, *the use of carburet of manganese in any process whereby iron is converted into cast-steel.* And, in further compliance with the said proviso, I, the said Josiah Marshall Heath, do declare the manner in which my said inventions are to be performed, by the following general explanations and particular details of the several processes:—

“Malleable iron is at present produced by smelting the richer iron ores with just as much charcoal, or other carbonaceous matter, as shall be adequate to abstract all the oxygen from the ore, and bring it into the malleable state, or by smelting the ore in contact with carbonaceous matter in such excess as to form with the metal the compound called carburet of iron by chemists, and cast-iron by manufacturers, and then to separate the carbon by a distinct and subsequent process. The first of these methods is that practised upon the purer native oxides of iron, in the catalan forges of the Pyrenees, in the Stuck Ofen of Carinthia, and in the Bloomeries of India: the second is that practised in the blast-furnaces of Great Britain upon the argillaceous ores of iron. By the first process, malleable or bar-iron of very unequal quality in its different parts is produced; by the second process, a cast-iron is obtained which is contaminated to a very considerable degree with sulphur,

phosphorus, arsenic, silicon, aluminum, &c.; and by both processes *a very large proportion of the metal is wasted into cinder under the blast, as well as in the operations of puddling and reheating [*717 the blooms. A pure native oxide, or carbonate of iron, is alone capable of producing a pure metal, convertible into good steel; but such pure ores have been hitherto debased and deteriorated in the smelting, by mixture with earthy, saline, or alkaline matters, under the name of fluxes, added with the intention of promoting the reduction of the metal, and of protecting it, when reduced, from the oxidizing influence of the blast. I have discovered, after an extensive course of experiments, that such earthy or other mixtures are not necessary towards the reduction of the pure native oxides and carbonates of iron; and this discovery constitutes my first invention under the present letters-patent. This invention consists in smelting such pure ore, without the formation of any vitreous flux, slag, or cinder, in manner as follows:—I commence the operation by filling progressively my blast-furnace with coke, charcoal, or other equivalent fuel, leaving the tap-hole open, that the flame of the fuel, urged by the blast, may play in all directions, downwards as well as upwards, so as to bring the whole interior of the furnace into a uniform state of incandescence; and, whenever the furnace is thus filled with ignited fuel, I close the tap-hole, and immediately throw into the mouth of the furnace 20lbs. of ore for every 100lbs. of fuel; and I continue to charge the furnace at this rate until such time as it is calculated that three or four cwt. of fluid iron are collected in the hearths, at which time I tap the furnace, and run off the melted metal into pigs. After this first discharge or casting, I begin to add the ore at the rate of 25lbs. for every 100lbs. of fuel, and continue to charge the furnace at this rate during a period of twelve hours, at which time I tap and run off a second casting of pig-iron: after this second discharge, I add ore at the rate of 30lbs. for every *100lbs. of fuel, during the third working period of [*718 twelve hours: and thus, in each successive period of twelve hours, I increase the burthen of ore at the rate of 5 per cent. of the weight of the fuel, till eventually the proportion of ore shall amount to about 65 or 70 lbs. for every 100lbs. of fuel. By proceeding in this way, and by throwing in the ore merely reduced to the size of peas, or thereabouts, but not roasted, I find, that, if the furnace be well attended to by the workmen, it will turn out about 50lbs. of pure pig-iron for every 100lbs. of fuel that are consumed. I prefer to run the fused metal into iron moulds, because I have found, that, when it is run into sand, as is commonly practised by the iron-smelters, it is apt to get covered with a coat of silicious matter, and is thereby contaminated and subject to waste in the subsequent conversion into malleable iron or steel: but I do not claim running the iron into iron moulds, as any part of my invention.

“ Having by the said process obtained a pure cast-metal, or a simple-

carburet of iron uncontaminated with the sulphur, phosphorus, silicon, and other metalloids present in ordinary cast-iron, I next proceed to convert that carburet into steel of any degree of hardness; which conversion I perform as follows:—I first melt the said cast-iron in a cupola furnace, by the heat of coke, as free from sulphur as possible, or by a mixture of such coke and anthracite, or, in certain localities, by wood charcoal; but, in all cases, I use no more fuel than is merely requisite to melt the iron; so that the oxygen of the blast will serve to burn away the carbon of the carburet, in a considerable degree, while I neutralize or remove a further portion of the carbon by the addition of scraps of metallic iron, or by the oxides of iron or of manganese, always taking care not to decarburate the metal to such a degree as to render it infusible, but to have about as much carbon in it as exists in cast-
 *719] steel. For *the purpose of producing a superior article of cast-steel from my said pure cast-iron obtained by the above-described process, I introduce sesquioxide of manganese, or peroxide, which had been previously ignited, in quantities not exceeding 5 per cent., into the cupola, while I employ no more fuel than the blast can readily burn into carbonic acid, for otherwise the excess of the carbonaceous fuel would deoxidize the manganese, nullify its decarburating action upon the cast-iron, and thus prevent it from reducing the metal to that lower stage of carburet which constitutes cast-steel. I also sometimes introduce into the cupola, for the same decarburating process, a portion not exceeding 5 per cent. of chrome ore, which consists of the oxides of chrome and iron, or a like proportion of pure oxide of iron. When the decarburation has been carried on in the cupola to the proper pitch, as has been already defined, the steely metal is to be run out, and cast into iron moulds; the ingots thereby formed are now to be converted into steel of any desired degree of mildness, by a further process of decarburation, which consists of stratifying the said ingots along with peroxide of iron, or peroxide of manganese, without charcoal, in a steel-cementing or other suitable furnace,—such furnace to be lined with iron, if it is constructed of fire-bricks or stone, to prevent the action of the peroxides upon the stone or bricks of the furnace: the ingots are to be here subjected to a cementing heat for a certain period, proportional in duration to the softness required in the metal.

“I further propose to improve the quality of malleable or bar-iron, by adding to the pig or plate-iron in the puddling furnace, while in fusion, from one to five per cent., or thereabouts, of any pure oxide of manganese, but without mixture of any other substance,—the sesquioxide being that which I prefer.

*720] “Lastly, I propose to make an improved quality of *cast-steel, by introducing into a crucible bars of common blistered steel, broken as usual into fragments, or mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three

per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, which are when fluid to be poured into an ingot-mould in the usual manner; but I do not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of my invention, but only the use of the carburet of manganese, in any process for the conversion of iron into cast-steel.

"I claim,—first, the reduction of the pure native oxides and carbonates of iron into cast-iron, without the intervention of flux or the production of cinder,—secondly, the production of cast-steel by decarburating cast-iron to a certain degree, in a cupola or other suitable furnace or crucible, with the addition of malleable iron or certain metallic oxides, and completing the decarburation to the required degree by subsequent cementation, in a suitable furnace, with an oxide of manganese or an oxide of iron, without any admixture of carbonaceous matter,—thirdly, the employment of manganese alone in the puddling of cast-iron,—and, fourthly, the employment of carburet of manganese in preparing an improved cast-steel."

The following witnesses were called on the part of the plaintiff below:—

Charles Atkinson, a manufacturer of steel at Sheffield:—"I have been in business nearly thirty years. There is bar-steel, shear-steel, and cast-steel. Bar-steel is bar-iron carbonized in a converting furnace: shear-steel is bar-steel manipulated by a certain process under a forge-hammer. The bar-steel is beat under the forge-hammer into lengths about three feet by one inch and a *half: shear-steel is bar-steel beat into lengths of three feet by one inch and a half square: [*721 it is then joined together, and heated in a furnace to that degree which produces a flux or welding heat. It is then beat under the forge-hammer until it forms a solid substance, purified from the earthy matter that it contained. In that process there was very considerable waste,—about one-fourth: the process was expensive; the value of shear-steel per ton entirely depended on the material it was made from; the material necessary for shear-steel was about on the average of 30*l.* to 40*l.* per ton. Shear-steel, when made into bars, was generally worth from 50*l.* to 60*l.* per ton. Cast-steel is bar-steel of a high conversion, that is to say, considerably carbonized. It is broken into small pieces, about two inches square, put into crucibles in weights varying from 28*lbs.* to 40*lbs.* in each crucible; it is there exposed to a very high heat, until the whole becomes liquid: it is then poured into moulds of the size and description necessary for the purpose for which the steel may ultimately be required. Blistered-steel is bar-steel with a blister upon it: it is generally known in the trade by that term. Blistered-steel is synonymous with bar. The blisters are generally raised in that part of the bar which happens to be not properly welded, or sound; the

heat, during the state of carbonization or conversion, producing a separation of the parts of the iron not sufficiently welded together in the first process. Bars of blistered-steel, broken into small pieces, are put into a crucible of clay, a small portion of coke-dust being used in the composition of the crucible; the crucible or pot is then placed in a wind or air furnace, during the process of the operation on the steel. The best marks of steel iron are always either Swedish or Russian, except what has come from India. I consider, if certain improvements were introduced, that would be the best that has ever been. The price of *the best marks of Swedish iron will average from 25*l.* to 35*l.* *722] per ton. All steel will not weld to iron. Before 1839, no cast-steel that I ever heard of, could be welded to iron, that was not the best Swedish or foreign iron. That very much enhanced the price of cutlery,—of table-knives, tools, and things of that description. I am aware of the plaintiff's process in the manufacture of cast-steel. I understand that carburet of manganese is a combination of carbonaceous matter and manganese. By the use of Heath's composition, we can manufacture from British iron, cast-steel that will weld. The price for the ordinary and common kinds of cast-steel, before the introduction of this process, was rarely less than from 40*l.* to 50*l.* per ton: the price now, is, from 30*l.* to 20*l.*, and I believe still lower. The composition is put into the melting-pot or crucible, in various stages, according to the fancy of the party, or their experience. Some put it in when the steel is cold, and some just before fusion. For 80*lbs.* of metal, a proportion of manganese of from one to three ounces, is put into the crucible. I have used Mr. Heath's composition. It does not break the pots. When the oxide of manganese is used alone with the blistered steel, without the carbonaceous matter, it does break the pots: it causes them to fall in pieces. It not only splits the pot to pieces, but the metal runs into the material of the pot,—it becomes porous, so as to admit it; the material of the crucible appeared to be rendered porous, so as to let the metal run through. Before 1839, I had heard of attempts to make welding-steel by the use of the manganese of commerce. I never remember hearing the term of carburet of manganese. The trials of which I had heard were of the black oxide of manganese. I never heard of success."

On cross-examination, this witness said,—“I never used carburet of manganese, to my knowledge, in the *manufacture of steel. I *723] used oxide of manganese and some carbonaceous matter. The carbonaceous matter introduced prevents that mischief of the breaking of the pots which the oxide of manganese itself used to cause. The pots do not break. The first time I ever heard of carbonaceous matter being used in connexion with oxide of manganese, was about the period that Mr. Heath obtained his patent. We use oxide of manganese and carbonaceous matter together in combination. We take a certain propor-

tion of oxide of manganese and of the carbonaceous matter reduced to a powder, and form a solid substance like paste, and a certain weight of that we put into the pot. We mix them ourselves. I first used this mixture at the latter end of the year 1839, or the early part of 1840."

Augustus William Johnson, a manufacturer of steel, at the Chelsea works:—"I was a manufacturer of steel at the Chelsea works for about thirty years. I have known the plaintiff about twenty years. He erected works near mine at Thames Bank, for making cast-steel,—furnaces for casting-steel,—previous to the date of the patent in 1839. I made experiments for him at my works a considerable time previous to the date of the patent. Carburet of manganese, having been made by him and my workmen, was put into the crucible with the blistered steel. That was previous to the taking out of the patent. Those experiments were conducted by himself, on my premises. I made cast-steel, after the patent, by the use of carburet of manganese. It was the best steel that could possibly be made; there was nothing ever produced in England equal to it before; it had the properties of welding; it was a welding cast-steel, and a steel that you could not, generally speaking, spoil. The greatest quantity of cast-steel is spoiled in the heating: a workman takes a piece of cast-steel, and burns it, and spoils it: that could not be the case with *this; it would bear a welding heat: he could give [*724 it a proper heat to weld it, without the danger of spoiling it: such a steel had never been made in England, to my knowledge. Cast-steel that would weld, had not, to my knowledge, been known before, unless it was by a chemical process; and then it was very rarely the case. I used considerable quantities of the carburet of manganese, under a license from Mr. Heath, and made large quantities of welding cast-steel, which I had made into cutlery of all descriptions: after that, I used what Mr. Heath gave me: it was a black mixture which got hard by keeping; there was coal-tar and manganese in it. Previously to Mr. Heath's process, I had never known of the use of manganese at all in the manufacture of steel: it was the greatest improvement that could possibly be made, and a great advantage to the trade."

Thomas Bevins:—"I am a file-cutter, and was formerly in the employ of Johnson & Co. at Sheffield. I know Mr. Heath. I remember his making experiments in the making of cast-steel, at the Chelsea works. We made some experiments at the Chelsea works, and also we had a work erected next door. In the first instance, we used the carburet of manganese for the making of cast-steel. I prepared the carburet of manganese, by lining the pots with charcoal, mixing of oxide of manganese with coal-tar, putting it into the pot with it, and exposing it to an excessive heat: the product of that was, the carburet of manganese. The carburet of manganese was put into the pot when the steel was in a fused state: it improved the quality of the steel wonderfully. I had been in

the iron and steel business all my life,—about forty years. Up to that time, I had never heard of the use of carburet of manganese in the making of cast-steel. It makes the steel more malleable. *We found afterwards, that, instead of making the carburet of manganese first, if we* *725] *took the coal-tar and *the manganese, and put them into the crucible where the steel was being melted, it produced the same effect.*

We mixed them together into a sort of paste, and then put them into a crucible where the melting steel was at the time: we put the paste into the crucible; the steel was melting nearly, within a few stages. We made the one heat, and one pot, serve the double process. I have tried to use the oxide of manganese alone, without the carbonaceous matter: I could not keep it in the pot; it spoiled the pot. I found that using the paste instead, without first forming the carburet,—putting the paste into the crucible with the steel, and making one pot and one heat serve the double purpose,—answered as well as when we used to make the carburet and put the carburet in. We discovered that using the carburet in the way I have described, would answer the same purpose as making the carburet first, about Michaelmas, 1839. We were making experiments all that autumn, and part of the next year too. I remember Mr. Heath's sending to different people packages of the paste containing the coal-tar and the manganese: I prepared it myself. He began to send those out in 1840. Very soon after we had made the discovery that that paste would answer, I sent some of the composition to Mr. Unwin, by desire of Mr. Heath. It was in 1840, I believe. I knew of Mr. Heath's addressing letters, and corresponding with Mr. Unwin at that time. I have seen Mr. Unwin's letters."

On cross-examination, the witness said:—"At first, I used the carburet of manganese, and put it into the pot. As soon as I discovered I could use the coal-tar and paste, without making the carburet first, I abandoned the use of the carburet, finding the other much cheaper. It saves both heat and time. The expense of making a pound of carburet of manganese, is 7s. or 8s.: I mean, the whole expense, including *726] wages, pot, coke, *materials, and all other things. The expense of a ton of oxide of manganese and coal-tar, is about 7l."

Robert Warrington, chemical operator at Apothecaries Hall:—"In 1844, I received from the plaintiff's attorney a substance in a packet. I submitted it to fusion: it yielded globules of carburet of manganese,—a large button and a number of small buttons of carburet of manganese. The mixture was given to me to be submitted to fusion, to see what the result would be. I proceeded to Sheffield at the commencement of this year. Mr. Cooper was with me. We made a series of experiments. There were two distinct sets of experiments. The first set of experiments had reference to the formation of carburet of manganese, and to the effect of the oxide of manganese on the pot: and the second set had reference to the improved quality of steel by the

use of carburet of manganese. The effect of the oxide of manganese alone upon the pot, was, that the pot was fluxed very rapidly: indeed, it was fused, not broken; it was melted through. We ascertained by that, that the oxide of manganese would destroy the pot. That destructive effect was prevented by the use of coal-tar. In the next set of experiments, we put oxide of manganese and coal-tar into the crucible, and nothing else. It was in a furnace with a pot by the side that was working steel. Each furnace was working two pots; and the experiment was made on one pot of those two in each case; so that the temperature of the working steel was maintained throughout. Carburet of manganese was made from the mixture, at the temperature at which steel was being worked: a mass of carburet of manganese was obtained from that pot, and the pot was not broken or fused. In the third experiment, each furnace contained two pots: the one pot contained steel, the other was empty. At the time of fluxing, the packet of manganese and coal-tar was put into the pot *with steel, and a similar packet was put into a small crucible, and [*727 introduced into the large empty pot which was by its side. The small crucible was taken out: at the bottom of it was found a button of carburet of manganese. The object was, that the mixture of oxide of manganese and coal-tar should be in the furnace the same time only in both cases, one with the steel, and the other without the steel. That experiment satisfied me that carburet of manganese would be formed in both cases, the one mixed with the steel, the other by itself. The carburet of manganese would be formed in the melted steel, as it was formed in the pot by its side, where there was nothing but the two elements: it would be formed mixed with the steel. In that state of things, carburet of manganese would be employed in the manufacture of steel. The carburet of manganese would be first formed, and would immediately alloy itself with the steel: it would form a carburet before it would become mixed with the steel. I had never known the use of carburet of manganese in the manufacture of steel before the date of Mr. Heath's patent."

John Thomas Cooper, a chemist of great experience:—"I went down to Sheffield with Mr. Warrington to make the experiments. We put oxide of manganese and coal-tar into a small pot, and oxide of manganese and coal-tar into the other pot where the steel was in the course of being melted. In the pot where there was no steel, we found a button of carburet of manganese. I agree with Mr. Warrington in his opinion, that the experiments show that the carburet of manganese must have been first formed in the pot where the steel was, and that then the carburet of manganese entered into alloy with the steel. In my knowledge of chemistry and the discoveries of chemists, I never heard of the use of carburet of manganese, or of the elements of carburet *of [*728 manganese,—coal-tar and oxide of manganese,—in the manu-

facture of cast-steel, before the date of Mr. Heath's patent; nor of the use of manganese in any way. I never heard of the application of the oxide of manganese to the same purpose, or of experiments being made with it."

On cross-examination, the witness said:—"I should conclude that the carburet of manganese is formed as a substance before it is mixed with the steel; and, as soon as it is formed, the alloy of the carburet of manganese takes place with the steel. This is a conjecture: it is impossible to say how it could be otherwise: I could not go inside the pot to see what was going on. There are no means of ascertaining but by the things being side by side; the carburet of manganese being introduced into the pot where it is formed, at the same time that it is put into the steel pot. The inference I should make from that, is, that, in the one case, the carburet of manganese was formed, and, as soon as it was formed, it alloyed with the steel, and, in the other case, it went down to the bottom of the pot. When the steel is melted, the melting steel is heated up to more than enough to reduce the manganese to the metallic state,—the state of carburet; and, as soon as the carburet is formed, it is fluxed, and goes into the steel. That is the inference I should draw; and there are no means I am aware of, from whence it could otherwise be obtained. The manganese must be melted itself, before the reduction takes place. When the oxide of manganese is put into the pot by itself at a very high heat, it melts, and, in its melted state, has a great affinity for the earthy matters of the pot, and they will fuse together into a form of glass, and the pot is either cracked or cut through. When the carbon is present, the carbon takes the oxygen from the oxide of manganese, the manganese is reduced to a metallic state, or a state of carburet, in *which it has no action whatever *729] on the pot. You have an analogy in the case of lead."

Dr. Ure deposed as follows:—"I am a fellow of the Royal Society, and a professor of chemistry. In my opinion, the carburet of manganese would be formed before it would mix with the steel. Oxide of manganese alone would destroy steel, instead of combining with it: it would oxidize and destroy it. Carburet of manganese will combine perfectly. Before the date of Mr. Heath's patent, I never knew of the use of carburet of manganese, in the manufacture of steel. I have been intimately acquainted with the application of chemical science for the last fifty years."

Professor Brande stated:—"I have heard the evidence of the experiments; and I have no doubt, that, in the first instance, the oxide of manganese and the coal-tar mutually act upon each other, so as to produce a carburet of manganese, and that then that carburet of manganese combines with the steel. The cast-steel is equally improved, whether you introduce the mixture as a carburet in the first instance, or use the ingredients which form a carburet, and then enter into com-

bination with it: the result is equal. I imagine, that, in any case in which there is an alloy formed between the steel and the carburet of manganese, the carburet of manganese must be first formed by some process or other."

It was admitted, on the part of the defendant, that the substance or composition received by Mr. Warrington from the plaintiff's attorney, as above stated, was received by the latter from the defendant, and that it consisted of oxide of manganese and carbonaceous matter. It was also admitted, that, since the date of the patent, the defendant had manufactured cast-steel, by using oxide of manganese and carbonaceous matter, introduced into the pot at the same moment with the steel,—the said three ingredients, oxide of manganese, *carbonaceous [730 matter, and steel, being introduced all at once, but each of the said ingredients being, at the time of such introduction, separate and apart from, and not in combination with, any of the others; and also, that, since the date of the patent, the defendant had manufactured cast-steel, by using only oxide of manganese with highly carbonized steel,—the said oxide of manganese and highly carbonized steel being introduced separately into the pot at the same time.

Professor Brande, being re-called, stated:—"I should think, that, if the steel were highly carbonized, it is barely possible that a carburet of manganese would be formed, at the expense of the carbon in the steel; but my apprehension would be, that, before the carburet of manganese could have been so formed, the oxide of manganese would have had time to act upon the crucible. If the crucible were protected by some lining of charcoal or other carbonaceous matter, a carburet of manganese would no doubt be formed: the oxide would act upon the lining, and form a carburet. I imagine, that, in any case in which there is an alloy formed between the steel and the carburet of manganese, the carburet of manganese must be first formed by some process or other: if the steel were very highly carbonized, I think it probable, that at a high temperature, the carburet of manganese might be formed, which, combining with the steel, would produce the same effect as if carburet of manganese itself had been originally added. The oxide of manganese would not combine with steel, unless it were converted into a carburet, or reduced or otherwise changed by the presence of carbonaceous matter; the only way such an action would take place would be, by the carbon reducing the manganese to the metallic state, and then the metal manganese itself would possibly combine with the steel: but, inasmuch as manganese has a very strong affinity for carbon, it is not *likely [731 under those circumstances such a change should take place, but that a carburet would be formed, and then that combine with the steel."

It was insisted, on the part of the defendant below, that there was no evidence of infringement by the defendant of the plaintiff's patent.

The learned judge directed the jury that there was no evidence of

infringement, and that therefore they ought to find a verdict for the defendant upon the first issue.

The counsel for the plaintiff below excepted to this ruling, insisting that there was evidence to go to the jury that the defendant had used the plaintiff's invention, and thereupon tendered a bill of exceptions, which was brought by writ of error to the Exchequer Chamber.

The case was argued in Easter Vacation, 1852, before Alderson, B., Coleridge, J., Wightman, J., Erle, J., Platt, B., and Crompton, J., by *Sir A. Cockburn* (with whom were *Bramwell* and *Webster*) for the plaintiff, and *T. Jones* (with whom was *Deighton*) for the defendant.

The two first-named learned judges were of opinion that the ruling of Cresswell, J., was correct; but, the rest of the court being of a contrary opinion, a venire de novo was awarded.

A writ of error having been brought upon this judgment, returnable in parliament, the case was argued in the House of Lords in the course of the session of 1854.

The following question was proposed to the judges.^(a)

Whether, looking at the record as set forth in the joint appendix to *732] the printed cases, there was evidence *for the jury that the plaintiff in error was guilty of an infringement of the patent stated in the declaration, by using oxide of manganese and carbonaceous matter in the manufacture of cast-steel, in the manner in which, according to his admission at the trial, he did use them?

The learned judges prayed time to consider, and afterwards (on the 21st of May last) delivered their several opinions, as follows:—

CROWDER, J.—My lords, the question upon which your Lordships have desired the opinion of the judges, is, “whether, looking at the record as set forth in the joint appendix to the printed cases, there was evidence for the jury that the plaintiff in error was guilty of an infringement of the patent stated in the declaration, by using oxide of manganese and carbonaceous matter in the manufacture of cast-steel, in the manner in which, according to the admission at the trial, he did use them.”

To this question I answer, that, in my opinion, there was evidence for the jury of the infringement of the patent.

The defendant in error took out the patent for certain improvements in the manufacture of iron and steel; and in his specification he mentions several, but the only one material to this inquiry is that which refers to the use of carburet of manganese.

This action was brought for the infringement of the patent by the plaintiff in error; and the question proposed by your Lordships arises upon the plea of not guilty. There are other pleas upon the record

(a) The judges present at the hearing, were,—Jervis, C. J., Pollock, C. B., Parke, B., Alderson, B., Coleridge, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., Platt, B., Williams, J., Crompton, J., and Crowder, J. But Jervis, C. J., and Coleridge, J., delivered no opinions.

raising issues as to the novelty of the invention and the sufficiency of the specification, which were found by the jury for the plaintiff below; and, indeed, for the purpose of considering the question of infringement, the *invention must be assumed to be new, and well de- [*733 scribed in the specification.

He declares the nature of his invention to be, "the use of carburet of manganese in any process whereby iron is converted into cast-steel." He afterwards describes the manner in which his invention is performed, in these words,—“I propose to make an improved quality of cast-steel, by introducing into a crucible bars of common blistered steel, broken as usual into fragments, or mixtures of cast and malleable iron, or malleable iron and carbonaceous matters, along with from 1 to 3 per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, which are, when fluid, to be poured into an ingot mould in the usual manner; but I do not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of my invention, *but only the use of carburet of manganese in any process for the conversion of iron into cast-steel.*” And, in another part of the specification, he says, “I claim the employment of carburet of manganese in preparing an improved cast-steel.”

By this language, I understand the substance of the invention to be, the application of carburet of manganese to the manufacture of cast-steel, in order to improve its quality; and I understand the *modus operandi* to be, substantially, the melting together in the crucible carburet of manganese and blistered steel or iron. It follows, I think, that the patentee is protected by his patent against the use of carburet of manganese with iron or blistered steel in its conversion into cast-steel, in any mode in which those substances are brought together in a fluid state in the crucible, so as to produce the same result. It seems to me to be immaterial in what manner, or at what time, the carburet of manganese is formed, provided it be present in a fluid state [*734 *when the cast-steel is in a condition to be poured into the ingot mould. It appears from the evidence, that, when the patentee obtained his patent, and for some time afterwards, he was in the habit of first making the carburet of manganese by melting together coal-tar and oxide of manganese; and, when that product had been obtained in a solid form, it was put into the crucible with fragments of iron or blistered steel; and the fusion of these materials together produced an improved cast-steel. It was afterwards found by the patentee, and communicated by him to the plaintiff in error and others, that if, instead of making the carburet of manganese first, and then putting it into the crucible with iron or blistered steel, its component parts, coal-tar and oxide of manganese, were put into the crucible with the fragments of iron or blistered steel, the carburet would be produced in

a state of fusion, and would then operate precisely in the same manner in the improvement of the cast-steel, with a very great saving of expense. And it is admitted that the plaintiff in error has manufactured cast-steel by placing coal-tar and oxide of manganese in the crucible with iron, and melting them together.

Now, there is ample evidence upon the record, from the scientific witnesses, for the jury to infer, that, by this process, carburet of manganese is formed in the crucible at a lower temperature than that at which the iron is fused, and that its action afterwards in alloying with the steel is the same as when the carburet of manganese is first put into the crucible in its solid form, and then melted: and that was indeed admitted in argument at your Lordships' bar: but it was contended, that, assuming such a state of facts to be clearly established in proof, it would afford no evidence of an infringement of the patent.

*735] It seems to me, however, that it is evidence of a *direct infringement, because it shows the use by the plaintiff in error of carburet of manganese melted with iron, in the process of its conversion into cast-steel, which is substantially the invention patented by the defendant in error. I do not perceive here the use of chemical equivalents; but I observe a direct use of the identical chemical agency described in the specification. The carburet of manganese in a fluid state acts in both processes upon the fused iron, and produces the same effect. The point to be reached in both processes, before the carburet of manganese can act upon the iron, is, the fusion of all the ingredients. When that has been accomplished, the action takes place, and the desired result is produced in the cast-steel. The only difference between the processes of the plaintiff and the defendant, is what occurs *before* that point is reached. The defendant in error makes his carburet with coal-tar and oxide of manganese, and puts it, when in a cold and solid state, into the crucible to be fused with the iron. The plaintiff in error makes his carburet with the same ingredients, but puts them in the crucible together with the iron, and melts them with one and the same heating; but, in doing this, he produces his carburet of manganese in a fluid state before the iron is fused or acted upon by it.

It is said, however, that both the language of the specification and the evidence in the cause abundantly show that the patentee never contemplated such a mode of combination of carburet of manganese with iron as is used by the plaintiff in error, and that, therefore, the use of it could not constitute an infringement of the patent.

A similar argument was urged by the defendants' counsel in the case of Neilson's hot-blast patent (*Neilson v. Harford*, 1 Webster's Patent Cases, p. 304, 8 M. & W. 806†), but without success. There it was *736] clear that the patentee was unacquainted, when he filed his specification, with the most beneficial mode of carrying his invention into effect. But it was held, that, although the use of pipes by

the defendants, which had not been in the contemplation of the patentee, was an improvement, it was nevertheless an infringement of the plaintiffs' patent. And, in *The Electric Telegraph Company v. Brett*, 10 Common Bench, 888, it was decided that a patent "for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits," was infringed by the defendant, whose electric currents were transmitted through a circuit, nearly one half of which was formed by the earth, instead of by metallic wires, although it was unquestionably a great improvement on the original invention, and although at the time of filing the specification it could not have been in the contemplation of the patentee, because the discovery had not then been made, that the earth would act in the same manner as a metallic conductor in completing the electric circuit. And so I think here the process of the plaintiff in error is an improvement upon the invention of the defendant in error, while at the same time it is an infringement of the patent.

For these reasons, I answer your Lordships' question in the affirmative.

CROMPTON, J.—I think that there was some evidence for the jury of an infringement of the patent in this case. Having given my reasons for this opinion at considerable length in the Exchequer Chamber, and those reasons being contained in the appendix to the printed case, and in 12 Common Bench, 540 (E. C. L. R. vol. 74), it is quite unnecessary to trouble your Lordships with a repetition of them.

I would observe, however, that I do not agree with *the argument for the plaintiff in error, that the question of *infringement* [*737 can depend on whether the mode of working alleged to be an infringement was or was not known to the patentee, or to those skilled in the particular matter, at the time of the specification. On a plea raising the question as to the sufficiency of the specification, the knowledge of the patentee may be material; but, upon the only issue now under consideration, the patent is to be taken to be valid, and the invention, as claimed, to be useful and novel; and it is to be taken that the patentee has specified all that he could be required to have specified. If a new process, of which he and all others were ignorant at the time of the specification, is found out afterwards, the exercise of such new process may be an infringement, provided that it is substantially the same with, or includes, the patented invention. An improved method of doing in effect the same thing may well be an infringement of the patent, though not known at the time of the specification.

Neither do I agree with the argument of the plaintiff in error, that this invention was merely putting solid pieces of carburet into the pot with broken pieces of iron. I have before given my reasons for thinking that the invention claimed was the use of the carburet in the manufacture of the steel, and for thinking that there was some evidence for

the jury that the new process was an improved and neater mode of carrying out the old invention.

It was said, that what was done in the present case was an equivalent merely for what was pointed out in the patent and specification; that all known equivalents must be expressly or impliedly specified; that the alleged equivalent in the present case must be assumed to have been unknown at the date of the specification; and that it must be treated *738] as a new discovery, not *within the range of the patent, and excluded from the specification, and, therefore, not an infringement.

Such an argument could only, in my opinion, be of any weight in cases where the supposed equivalent is something really different from the thing itself; as, if, in the present case, the alleged infringement had been by using, instead of the carburet of manganese, one or more substances which, alone or united, though not being carburet of manganese, would have had the same effect in making the improved steel,—the use of such different things producing the same effect, whether operating in the same or a different manner, might be the use of things out of the patent, and might properly be called the use of an equivalent. The present is not, in my opinion, the use of what can be properly termed an equivalent. If the oxide and the carbonaceous matter operated so as to produce the same effects as the carburet, without forming the carburet, they might possibly be deemed equivalent to it; but the evidence was pointed to a direct using of the carburet. I look upon this, therefore, as a case, not of any equivalent, but as a case where there was evidence of a direct infringement of the patent by the use of the carburet of manganese.

The effect of the evidence was, that the carburet of manganese was made in a less expensive way in the pot, instead of a more expensive way out of the pot.

The knowledge or intention of the party infringing the patent is now most properly admitted to be immaterial; and, if there was no evidence of infringement in the present case, any person might, after the patent and specification came out, have gone to a scientific chemist, and said, “There is a new invention of making improved steel, by applying carburet of manganese to the iron in the process of melting; cannot we manage to put together the ingredients of carburet of manganese in packages, and put these packages in the pot, so that the *739] carburet may be formed in the pot, and have the same effect as if put in in the shape of carburet?” And the execution of this plan would, according to the argument of the plaintiff in error, have been no infringement, but would have merely been the legitimate use of a new discovery. To my mind, it would appear to be a direct use of the carburet in the making of an improved steel.

The only way in which I think there would be a defence on the plea

of not guilty, is, if your Lordships should adopt the argument which I have before referred to, and should hold the invention not to be the use of the carburet in the manufacture, but merely the putting into the pot the specified materials in the manner and proportions pointed out by the plaintiff as his *modus operandi*. And this appears to me to be the real question in the case. I think that it would be a narrow and dangerous construction, to limit the invention, claimed in express words, by the mode and process of working which the plaintiff sets forth as a means of carrying his invention into effect.

I would add, with reference to what was stated at the bar to have been the evidence given at the late trial at Liverpool, which, though not on the record, I may refer to as a supposed state of facts, that, supposing there had been *previously* to this patent a public and well-known user of putting the oxide of manganese and carbonaceous matter with the iron into the pot, and it had appeared by the evidence of chemists that this process, though not known to do so at the date of the patent, really operated by the formation of carburet of manganese within the pot, and that, when formed, the carburet applied itself to the iron; and supposing, that, in such a state of the manufacture, the plaintiff had taken out his patent for the employment of carburet of manganese in the manufacture of steel; I should think it clear that there was evidence to go to the jury that the *patented invention [*740 was not novel. It certainly would seem strange, if the patent claiming the invention of the employment of the carburet could be supported, when it appeared that the carburet had been long so employed by being formed in the pot from the oxide and the carbonaceous matter, though the exact mode of the operation had not been known. In fact, the plaintiff's invention in such a case would have been, what indeed it seemed from the evidence at the trial at Liverpool to have really been, a discovery of a worse and more expensive mode of applying the carburet. If proof of such user before the patent would be evidence that there was no novelty, it seems to follow that the user after the patent would be evidence of an infringement.

The argument urged at the bar as to its being matter of speculation and doubt, whether the carburet was really formed in the pot before it alloyed itself with the steel, would only go to prove that the weight of the evidence for the jury was less. But I think that there was clearly some evidence of that fact; and, if so, that there was evidence for the jury, that the new process was an "employment of the carburet of manganese in the manufacture of steel," though in a method improved and neater than the one first adopted by the plaintiff, and mentioned by him in his specification as a mode of carrying out his invention.

I answer your Lordships' question, therefore, in the affirmative.

WILLIAMS, J.—My Lords, this case appears to me to turn entirely

on the question, what is really the invention described and claimed by the patentee in his specification?

If it is merely the particular process for the manufacture of cast-steel therein described, then, in my *opinion, the plaintiff in *741] error would not be guilty of any infringement of the patent by reason of using the oxide of manganese and carbonaceous matter in that manufacture in the manner in which it is admitted he did use them; for, according to the described process, carburet of manganese, a then-existing thing, is to be put into the crucible together with steel or iron, in defined, though not exactly defined, proportions of weight to each other, and then heat is to be applied. Now, it is plain that the melting together of oxide of manganese and carbonaceous matter with steel or iron, is no direct infringement of a patent for this process. And the only question can be, whether it is an indirect infringement, by the substitution of an equivalent. There is ample evidence, that, to melt together oxide of manganese and carbonaceous matter with steel and iron, will serve as an equivalent for the melting together of carburet of manganese with steel or iron in producing the desired result. But there is no evidence, that, at the time of the patent and specification, this was known to persons of ordinary skill in chemistry. And I fully agree with the doctrine which has been repeatedly laid down in the course of the discussion of this case, that, though the use of a chemical or mechanical substitute, which is a known equivalent to the thing pointed out by the specification and claimed as the invention, amounts to an infringement of the patent, yet, if the equivalent were not known to be so at the time of the patent and specification, the use of it is no infringement.

But, if the invention described and claimed by the patentee in this case is not the particular process specified, but the employment of carburet of manganese in the process of the conversion of iron into steel, and if the description of the process in the specification, instead of being a description of the invention, is only a description of one mode *742] of carrying the invention into effect, *an entirely different doctrine becomes applicable to the question, viz. the doctrine that, if a patent is taken out for the application of a principle, coupled with a mode of carrying the principle into effect, the patentee is entitled to protection from all other modes of doing so, whether known or not known at the time of the specification. And I am of opinion that the latter is the true view of the invention described and claimed by the patentee in this case.

If this be so, there is no room for doubt that there is evidence of an infringement of the patent; for, there is evidence that the oxide of manganese and carbonaceous matter, as used by the plaintiff in error in the manufacture of cast-steel, formed in the crucible, by the action of the heat, a carburet of manganese before the steel or iron began to

melt, and that, subsequently, when the steel or iron melted, the carburet alloyed itself therewith, producing thereby the improved cast-steel; and that, in this way, carburet of manganese was employed in the process used by the plaintiff in error for converting steel or iron into cast-steel, in order to procure an improved cast-steel.

For these reasons, I beg to answer your Lordships' question in the affirmative.

PLATT, B.—The patentee claimed under his patent, for himself and his licensees, the exclusive use of carburet of manganese, in any process whereby iron is converted into cast-steel.

The substance, of which he has so claimed the exclusive use in an improved manufacture of cast-steel, was a well-known chemical body, having a distinctive appellation descriptive of its component parts.

Persons of humble chemical acquirements would know that carburet of manganese resulted from the combination of oxide of manganese with carbon; and, finding by *experiment that the constituent parts placed together in a crucible with iron would form their combination before the iron was ready for their united action, might readily hit upon the expedient of collecting in the crucible oxide of manganese, carbonaceous matter, and the steel, submitting the whole to the same heat, and thus, while the fusion of the steel was proceeding, manufacturing and preparing for action contemporaneously in the same pot the carburet of manganese, and afterwards continuing the carburet in a state of fusion, and using it while in that state in a process whereby iron was converted into cast-steel. [*743]

Was there evidence of such a state of circumstances? Such evidence appears to me to have been presented by the testimony of Thomas Bevins, Robert Warrington, John Thomas Cooper, Andrew Ure, and William Thomas Brande. Their testimony concurred to establish that the effect of introducing into the crucible oxide of manganese and carbonaceous matter with the steel, was the same as that produced under Heath's patent; that neither the carbonaceous matter nor the oxide of manganese alone would produce the desired result on the steel, and that, in the operation, they must have combined, and in their combined state of carburet of manganese alone produced that result.

If, instead of putting into one crucible the carbonaceous matter, the oxide of manganese, and the steel together, the plaintiff in error had first submitted to the action of heat the carbonaceous matter and the oxide of manganese, and so produced the combined body, carburet of manganese, and in a second operation used this carburet in the improved manufacture of cast-steel, that second operation would have been an infringement of the patent.

Does it become less an infringement, because Mr. Unwin manufactures, while the steel is undergoing the *process of fusion, the carburet in the same pot? If a dyer had discovered that the use of sul- [*744]

phate of soda, in preparing fluids for dyeing silken, woollen, or cotton fabrics, improved the brilliancy of colour, and promoted economy in the exercise of his art, and, the invention being new, he obtained a patent for the improvement, could any other person, without infringing the dyer's patent, afterwards prepare the same fluids for the same purposes, and, in doing so, instead of adding the sulphate of soda, add the sulphuric acid and soda separately? Could he say, that, although true it is that my result is precisely the same, yet, as I mixed with the fluid soda and sulphuric acid separately, leaving them to the consequences of their natural affinities, and did not use both together in their combined form of sulphate of soda, I have not infringed the right of the patentee under his patent?

The Court of Exchequer, in giving their judgment in *Heath v. Unwin*, as reported in 13 M. & W. 502, 503,† after observing that the specification was expressly for the employment of carburet of manganese, seem to have relied on the putting a certain quantity of it in an *unmelted* state into the crucible, as being the particular mode of using it in pursuance of the patent. According to this narrow construction, Unwin would not have been guilty of an infringement by using the carburet, provided he poured it in a molten state into the crucible containing the iron. The patent, however, as explained by the specification, cannot be so limited. The use of the carburet, whether introduced into the crucible in an unmelted or in a molten state, or actually composed in the pot containing the steel, would, as it seems to me, fall equally within the protection of the letters-patent, which granted a monopoly of the general use in a particular branch of the manufacture of steel. *Ad questionem facti non respondent iudices: ad questionem *745] legis non respondent juratoris.* It was not for the judge, but for the jury, to decide whether the deductions of chemical science, warranted by investigation and experience, were the results of mere conjecture, or were so justified by sound reason, applied to the consideration of Unwin's mode of conducting the process of converting iron into cast-steel, and of the well-known properties of the bodies selected for so conducting it, as to enable them safely to conclude that Unwin had in that process used carburet of manganese. John Thomas Cooper alone of all the witness used the word "conjecture." But, in what sense he used that word, appears by his testimony. In his examination-in-chief he says, "I agree with Mr. Warrington, in his opinion, that the experiments show that the carburet of manganese must have been first formed in the pot where the steel was, and that then the carburet of manganese entered into alloy with the steel." And, on his cross-examination, he says, "I should conclude that carburet of manganese is formed as a substance before it is mixed with the steel, and, as soon as it is formed, the alloy of the carburet of manganese takes place with the steel. This is a conjecture. *It is impossible to say how it*

could be otherwise. I could not go inside the pot to see what was going on." And, in the concluding part of his cross-examination, he further says, "*When the steel is melted, the melting steel is heated to more than enough to reduce the manganese to the metallic state, the state of carburet; and, as soon as the carburet is formed, it is fluxed, and goes into the steel; that is the inference I should draw, and there are no means I am aware of, from whence it could otherwise be obtained. The manganese must be melted itself before the reduction takes place.* When the oxide of manganese is put into the pot by itself, at a very high heat, it melts, and in its melted state has a great affinity, if I may so term it, for *the earthy matters of the pot; and they will fuse together into the form of glass, and the pot is either cracked or cut through. [*746 When the carbon is present, the carbon takes the oxygen from the oxide of manganese, the manganese is reduced to a metallic state or a state of carburet, in which it has no action whatever on the pot."

Thus, in giving his testimony, he states as facts, that the carbon of the tar and the oxide of manganese would fuse before the steel; that the oxide, unless diverted from its action on the pot, would break it; that the oxide did not act upon the pot; that the action of the carbon on the oxide would prevent its doing so; and that the mutual action of the carbon and the oxide on each other in a state of fusion, would elaborate carburet of manganese. Putting together these facts, and adding to them the identity of the improvement effected in the cast-steel by the operation of Unwin, and by the operation of Heath, and the knowledge that the use of carburet of manganese *alone* had up to the time of the witness's appearance at the trial effected that improvement, any one acquainted with the rudiments of chemistry would reasonably conclude that the result of fusing together in the same pot carbonaceous matter and oxide of manganese must be carburet of manganese; that, in Unwin's operation, this compound body was ready to operate on the iron as soon as that metal was melted, and was, in truth, then used in the process of converting the iron into cast-steel.

The patent was not for introducing into the crucible with the steel any certain body or bodies, or such body or bodies in a prescribed state, but for the *using* the carburet of manganese, however formed, in the process of the contemplated conversion. The use really begins *as soon as, and not before*, the carburet and the iron are both in a state of fusion. Whether the plaintiff in *error directly or indirectly [*747 used the carburet of manganese in a process whereby iron was converted into cast-steel, was purely a question of fact. The affirmative of that question seems to me to have been supported by the testimony of the witnesses to whom I have already alluded.

To the question, therefore, proposed by your Lordships, "whether, looking at the record as set forth in the joint appendix to the printed cases, there was evidence to go to the jury, that the plaintiff in error

was guilty of an infringement of the patent stated in the declaration, by using oxide of manganese and carbonaceous matter in the manufacture of cast-steel, in the manner in which, according to his admission at the trial, he did use them," I answer, in conformity with the opinion expressed by me in the Exchequer Chamber, and printed in the appendix, that, in my judgment, there was such evidence.

ERLE, J.—My answer to your Lordships' question is in the affirmative. The patent is for the employment of carburet of manganese in the manufacture of cast-steel, not for a mode of making that carburet; and there is evidence to prove that the defendant, by heating the elements of carburet of manganese with iron, formed first the carburet and then cast-steel.

If the evidence satisfied the jury of this fact, it would satisfy them that the defendant used carburet of manganese in the manufacture of cast-steel, and so directly infringed the patent. Thus, there was evidence for the jury of a direct infringement.

Further, I am of opinion, that, if the jury were not satisfied that carburet of manganese was formed in the process used by the defendant, and so were not satisfied of a direct infringement, still there was evidence from which they might find that he had indirectly infringed *748] *this patent for the use of a substance in a process, by the use of the elements of that substance in that process, which elements were known to be equivalent, chemically, to the substance itself in that process.

At the time of the patent, the patentee made the carburet by heating the carbon and manganese till the carburet was formed. He then used the carburet by heating it with the iron till the cast-steel was formed. He afterwards discovered, that, if the elements of the carburet were heated with the iron, the same result would be obtained, and one heating would be saved. He communicated the effect of this discovery to the defendant, by selling to him a packet containing these elements of the carburet to be so used. And the patentee knew at the time of the patent these to be the elements from which he formed the carburet, and, from that knowledge, was induced to use these elements as equivalent to the substance mentioned in the specification. There is, thus, evidence that the defendant infringed the patent, by the use of the elements of the patented substance, which were known at the time of the patent to be equivalent to that substance.

I am also of opinion that a patent for the use of a substance in a process, is infringed by the use of the elements of that substance known to be equivalent thereto at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colourable variation therefrom. Taking the instance put in the argument of the case in the Exchequer,—if a patent was for the use of soda in a process, and by subsequent analysis sodium and oxygen were discovered to be

the elements of soda, and equivalent thereto in the process in question, the use of sodium and oxygen in the patented process for the purpose of being equivalent to soda in that process, would appear to me to be an infringement, although the analysis of soda was *subsequent [*749 to the patent. In like manner, if the discovery had been made after the patent, that carbon and manganese were elements of the carburet, equivalent to the carburet of manganese in the patented process, the use of those elements in that process for the purpose of being equivalent to the carburet, would, in my judgment, be a colourable variation, and an infringement.

On those grounds, I answer your Lordships' question in the affirmative.

CRESSWELL, J.—My Lords, looking at the record as set forth in the joint appendix to the printed cases, I am of opinion that there was evidence for the jury that the plaintiff in error was guilty of an infringement of the patent stated in the declaration, by using oxide of manganese and carbonaceous matter in the manufacture of cast-steel, in the manner in which, according to his admission at the trial, he did use them.

The plaintiff, by his specification, claimed as part of his invention the employment of carburet of manganese in preparing an improved cast-steel; and he proposed to make an improved quality of cast-steel, by introducing into a crucible bars of common blistered steel, broken as usual into fragments, or mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with one to three per cent. of their weight of carburet of manganese, &c.; but he did not claim the use of any such mixture of cast and malleable iron and carbonaceous matter, but only "the use of carburet of manganese in any process for the conversion of iron into cast-steel."

It was admitted on the trial, that the defendant had, since the date of the patent, manufactured cast-steel, by using oxide of manganese and carbonaceous matter introduced into the pot at the same moment with the steel; and several scientific witnesses gave their opinion that the oxide of manganese and carbonaceous matter so *introduced [*750 would first form a carburet of manganese, which would as soon as formed enter into combination with the steel, and that the oxide of manganese would not combine with the steel until it had first formed a carburet by union with the carbonaceous matter. It seems to me, therefore, that there was evidence for the jury of the defendant having used carburet of manganese in the manufacture of cast-steel.

If the plaintiff had claimed only the particular method of using carburet of manganese in the manufacture of steel, which is described in his specification, I should have thought that the process adopted by the defendant had not infringed his patent right; but his claim was general, to the employment of carburet of manganese in preparing an improved cast-steel, although he also described, as indeed he was bound to do, the

mode in which he proposed to meet it. The claim being general, and the evidence in support of the action tending to show that the defendant had used carburet of manganese in the manufacture of steel, by causing it to be first formed in the pot, and afterwards mixed with the steel, I think the case is not one where an equivalent has been used; but the thing itself; and, if the thing itself was used, although the defendant was not aware of it, he has still infringed the patent.

In *Stevens v. Keating*, as set out in the joint appendix, (a) it appears that the plaintiff took out a patent for making cement by uniting gypsum with an acid and an alkali; the defendant made cement by uniting gypsum with borax. It was discovered that borax was composed of an acid and an alkali; and Lord Cottenham held that the use of it was therefore an infringement of the patent.

And, in the case of *Neilson v. Harford and others*, 1 Webster's Patent Cases, p. 310 (8 M. & W. 806,† S. C.), Parke, B., used this language: *751] "If the *specification is to be understood in the sense claimed by the plaintiffs, the invention of heating the air between its leaving the blowing apparatus and its introduction into the furnace, in any way, in any close vessel which is exposed to the action of heat, there is no doubt that the defendants' machinery is an infringement of that patent, because it is the use of air which is heated much more beneficially, and a great improvement upon what would probably be the machine constructed by looking at the specification alone; but still it is the application of heated air, heated in one or more vessels between the blowing apparatus and the furnace."

So, in the present case, the claim made and specified by the plaintiff below, is, "the use of carburet of manganese in any process whereby iron is converted into cast-steel," and is not limited to the precise mode of using it described in the specification. There was evidence for the jury that the defendant below had used (although in a more beneficial manner) carburet of manganese in a process whereby iron was converted into steel, and therefore that the patent of the plaintiff below had been infringed. I cannot distinguish the principle upon which the cases cited on this point proceeded, from that which is involved in this case. I feel, therefore, bound to say, that, in my judgment, there was evidence for the jury that the plaintiff in error was guilty of an infringement of the patent right of the plaintiff below.

WIGHTMAN, J.—Upon a careful reconsideration of this case, I have not found any reason that has appeared to me sufficient to alter the opinion upon it which I have already expressed in the Court of Exchequer Chamber. I am, therefore, of opinion, as before, that "looking at the record as set forth in the joint appendix to the printed cases, there was evidence for the jury that the plaintiff in error was guilty of an in-

(a) See 2 Phillips, 333.

fringement of the *patent stated in the declaration, by using oxide of manganese and carbonaceous manner in the manufacture of cast-steel, in the manner in which, according to his admission at the trial, he did use them." And, for my reasons for arriving at this conclusion, I beg permission to refer to the opinion I have already given in the court below,—12 Common Bench, 547 (E. C. L. R. vol. 74),—and to which I have nothing to add.

MAULE, J.—My Lords, I am of opinion that there was not evidence for the jury that the plaintiff in error was guilty of an infringement of the patent, by using oxide of manganese and carbonaceous matter in the manufacture of cast-steel, in the manner in which, according to his admission at the trial, he did use them.

That part of the plaintiff's invention the infringement of which is complained of, is in effect described in the specification as a method of making an improved quality of cast-steel, by introducing into a crucible the ordinary materials from which cast-steel is produced, "together with from one to three per cent. of their weight of carburet of manganese;" the rest of the process, melting, &c., being the same as that in common use for making cast-steel. The specification then proceeds to disclaim as part of the invention the use of such ordinary materials, and restricts the claim to "the use of carburet of manganese in any process for the conversion of iron into cast-steel."

The act complained of as an infringement, is, the use of oxide of manganese and carbonaceous matter, by putting them into a pot or crucible with the ordinary materials, and then conducting the process in the known and usual manner. The question whether this is an infringement, depends on whether the defendant can properly be said to have used carburet of manganese in the sense in which the use of that substance is claimed *by the patentee, that is, either in the precise manner described by him in his specification, or in any manner substantially the same. [*752]

It was contended, for the defendant in error (the plaintiff below), that the process of the defendant below was substantially the same as that of the plaintiff below. Looking at the two processes as above described, without reference to any evidence respecting them, there would be no doubt that the defendant below had not infringed the patent. The plaintiff claimed the use of carburet of manganese; the defendant used oxide of manganese with carbonaceous matter, very different substances from the carburet of manganese, both in respect of their chemical character, and their price,—the defendant producing the same result at a much cheaper rate than the plaintiff.

But several witnesses were called for the plaintiff, who gave evidence of their opinion that carburet of manganese was formed in the defendant's process before the steel melted. They appear to have inferred this from the result of these two processes being the same, and from

the fact that carbon and manganese, the substances of which carburet of manganese is a combination, are present in the carbonaceous matter and the oxide of manganese, though in combination with other substances, and particularly (as regards the oxide of manganese) with oxygen, certain decompositions and combinations taking place during the process, which resulted in the production of carburet of manganese before the conclusion of the process. Whether this be a correct theory, is not now in question. There was certainly evidence, such as should have been submitted to a jury, of the formation of carburet of manganese in the defendant's process, if that would show that the defendant had used carburet of manganese so as to infringe the patent; but it *754] appears to me, that, on the assumption that carburet of manganese was formed in the defendant's process, in the manner described by the witnesses, there was no use of carburet of manganese by the defendant so as to constitute an infringement of the patent.

The whole process of the plaintiff, so far as it is new, consists in putting carburet of manganese into the pot with the usual articles from which cast-steel is produced; and the whole of the defendant's process consists in a similar use of a mixture of carbonaceous matter and *carburet of manganese*.(a) All the rest of both processes consist in treating the substances operated on in the way commonly used by manufacturers of cast-steel. It seems to me that a person employing the defendant's process cannot, with any propriety, be said to have used, or have had, or possessed, any carburet of manganese,—any carburet of manganese which he has or uses, is, according to the theory of the witnesses,—which must be supposed to be true,—formed and mixed in a fluid state among the substances in a crucible at a great heat. Whether it could possibly be extricated in a separate state from the crucible, does not appear; but it is certain, that, in the defendant's process, no carburet of manganese is put into the pot, and none taken out.

It may be remarked that the defendant's process does not consist, as it sometimes has been assumed to do, of putting into the crucible two simple substances, which in their combination would produce carburet of manganese, but is of a much more complicated description, and, according to the evidence, particularly that of Mr. Cooper and Dr. Ure, oxide of manganese by itself would be destructive: when melted, it would combine with the earth of the crucible or pot, and form a glass, and so make holes in the crucible, and render it unserviceable; and the oxygen of the oxide would also destroy the steel, by combining with it, and converting it into an oxide of iron: but, when the oxide of *755] manganese is accompanied by carbonaceous matter, the mischief is prevented by means of the whole of the oxygen of the oxide combining with the carbon in the carbonaceous matter, and being carried off in the form of oxygen gas, so that there is no melted oxide to combine with the earth of the pot, and no oxygen to combine with

(a) "*Oxide of manganese*,"—vide post, p. 769.

and oxidize and spoil the steel; but the metal of the oxide, that is, the manganese, combines with some of the carbon, and then acts on the steel in the same manner as if carburet of manganese had been introduced at the beginning of the process. Supposing this theory to have been formed by the *inventor* of the defendant's process, and to have led him to it, he would have formed a very bold and ingenious conjecture; and, when experiment proved that the result was such as was expected, it would show him to have discovered a valuable process, much more valuable than, and totally different from, that of putting carburet of manganese into the pot. The theory shows why and in what manner the defendant's process produces the same result as the plaintiff's, by indicating a series of decompositions and new combinations taking place in a certain order after the defendant has done all that the novelty of his process consists of. This theory may account for the identity of the results, but does not show that they are arrived at by the same process; and certainly fails to prove the identity in form or substance of what the defendant does when he puts oxide of manganese and carbonaceous matter into the pot, with what the plaintiff does when he puts carburet of manganese into it.

PARKE, B.—In answer to the question proposed by your Lordships, I have to say, that, in my opinion, there was no evidence of infringement to be submitted to the jury.

It must be assumed, in answering the question, that *the bill of exceptions states sufficient evidence for the jury, viz. the opi- [*756
nions of scientific persons, that carburet of manganese was formed in the process of melting in the crucible, and then combined with the steel in a state of fusion: and the question is, whether this is such a use of carburet of manganese in the manufacture of cast-steel as to be within the specification. This depends upon the meaning of that specification.

If it meant, as argued at your Lordships' Bar, to comprise every method of making cast-steel, so that carburet of manganese, in *any* state or condition, should be present during the process, there would be, doubtless, evidence of an infringement of the patent. Whether such a specification would be good, as describing sufficiently such a patent right, or whether a patent could be granted for such a right, is another question, not necessary to be considered in answering your Lordships' question. But I am of opinion that the patent, as explained by the specification, is not so extensive.

The language of the specification, in the part on which this question arises, is as follows:—"Lastly, I propose to make an improved quality of cast-steel by introducing into a crucible bars of common blistered steel, broken, as usual, into fragments, or mixtures of cast and malleable iron, or malleable iron and carbonaceous matters, along with from one to three per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, which

are, when fluid, to be poured into an ingot mould in the usual manner; but I do not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of my invention, but only the use of carburet of manganese, in any process for the conversion of iron into cast-steel." And then it proceeds, fourthly, to claim "the employment of carburet of manganese, in preparing an improved cast-steel."

*757] *It is clear, in my opinion, that the patent, explained by the specification, is, for the use of the metallic substance called carburet of manganese already formed by a previous process (whether by the same person who manufactures the steel, or bought by him from another, as an article of commerce, is immaterial), a tangible substance existing in the state of carburet of manganese, and capable of being weighed as such, before it is placed in the crucible. It is for the use of such a substance only.

The plaintiff in error has certainly not used any carburet of manganese, so understood, in any way, either directly or indirectly. He has used materials which, during the process, are to be assumed to form for a time, a substance in a state of fusion formed of carbon and manganese, and therefore properly called carburet of manganese; but that is not the use of *such* carburet of manganese, nor in such a state as is intended by the specification, and which alone the plaintiff's patent protects.

This the specification distinctly expresses. The substance is pointed out, and the mode of using it, by putting a certain quantity, by weight, of that substance, in an unmelted state, into the crucible. It is impossible to express the intention of the patentee in more distinct words. I am, therefore, clearly of opinion, that there is no evidence of a *direct* invasion.

And I think, also, that there is no evidence of an *indirect* infringement of the patent. There was certainly no intention to imitate the patented invention; for, it is not stated that the defendant knew, nor does it appear that any one knew, before the patent, nor indeed before the alleged infringement, that the mixture of oxide of manganese and coal-tar would, in the course of fusion, form carburet of manganese, and in that state combine with the steel.

*758] *In delivering the judgment of the Court of Exchequer, in a former action upon this patent,—13 M. & W. 593,†—I stated the opinion of the court to be, that there could be no direct infringement, if the defendant did not intend to imitate at all. That part of the judgment has been since justly objected to, in *Stevens v. Keating*; and no doubt we were in an error in that respect. There may be an indirect infringement, as well as a direct one, though the intention of the party be perfectly innocent, and even though he may not know of the existence of the patent itself. But, though this position be

erroneous, I am still of opinion that there was no indirect infringement of the plaintiff's patent.

The patent being for the use of the substance, carburet of manganese, and the mode described being the putting into the crucible a definite quantity of that substance with the steel, it would be an indirect infringement, to use that substance in a separate distinct state, before or after the steel and carbonaceous matter was put in, or in a subsequent part of the process. There is no evidence of *such* an infringement.

But I am clearly of opinion, that the use of oxide of manganese and coal-tar, in the manner adopted by the defendant below, still less the use of highly carburetted steel, is no indirect infringement. If it were an indirect infringement of this patent to use known chemical equivalents, I think there is no evidence of such an infringement, in the proper signification of those words.

I entirely agree with the opinion expressed by my Brothers Alderson and Coleridge (reported 12 Common Bench, 552, 549 (E. C. L. R. vol. 74), in delivering their judgment in the Exchequer Chamber in this case.

The specification must be read as persons acquainted with the subject would read it *at the time* it was made; and, if it could be construed as containing any chemical *equivalents, it must be such as are [*759 known to such persons at that time; but those which are not known at the time as equivalents, and afterwards are found to answer the same purpose, are not included in the specification. They are new inventions.

Now, there is no evidence whatever, that oxide of manganese and carbon were known at the time of the specification (which, I agree with my two learned Brothers, Alderson and Coleridge, 12 Common Bench, 552, 549 (E. C. L. R. vol. 74), is the true time to be looked to, and not the time of the use of them) to be an equivalent, for the purposes of the process, to the use of carburet of manganese, or that they would form carburet of manganese at that stage, which appears to have been essential to the operation, and have the same effect, or in the relative quantities, as stated in the specification. In order to form evidence of an infringement of the patent, it was essential to prove such knowledge by competent persons at the time of the patent, and not since. All this is a subsequent discovery, for which the plaintiff below might have taken out a patent; but it is not included in *this* patent.

I will add, that, even if the use of oxide of manganese and carbon were known to be a chemical equivalent at the time of the specification, I think that this specification would not include it; for, the mode of user is confined to the particular substance, carburet of manganese, in an unmelted state; and consequently that there would have been no infringement. But, assuming it to have been unknown at the time of

the patent, I think it clear it is not one. In order to make it so, it was essential for the plaintiff below to have shown, not merely that it is now known to chemists that the substances form the substance the subject of the patent, but that it was so at the time of the specification.

*760] I am, *therefore, clearly of opinion that there was no evidence of infringement to be submitted to the jury.

ALDERSON, B.—My Lords, I have already given my opinion in this case, as it appears in the report of the case in the court below, 12 Common Bench, 552 (E. C. L. R. vol. 74). I entertain the same opinion still, and I have no reasons worthy of your Lordships' attention to support that opinion, in addition to those which I have already given.

POLLOCK, C. B.—In answer to the question proposed by your Lordships to the judges, I am of opinion, that, looking at the record as set forth in the joint appendix to the printed cases, there was no evidence for the jury that the plaintiff in error was guilty of an infringement of the patent stated in the declaration, by using oxide of manganese and carbonaceous matter in the manufacture of cast-steel, in the manner in which, according to his admission at the trial, he did use them.

The first question that presents itself, is, What is the plaintiff's invention? What has he discovered? or, rather, What invention, discovery, or process is protected by the patent? To solve this, we must look at the title and specification of the patent. Strictly speaking, nothing is protected by the patent that is not found in the specification, either directly expressed in terms, or reasonably to be inferred from what is so expressed, by persons skilled in the subject to which the patent relates. The right of the plaintiff does not turn upon the extent of his claim, but upon the communication made to the public as to the mode of accomplishing his object; and he has no right to claim anything but that which he has communicated to the public, however large in point of language his claim may appear to be.

The title of the present patent, like most others, merely states, in
*761] very general terms, to what subject it *relates; and, as usual, communicates as little as possible beyond that matter. It is in the specification (which, while it creates, also limits, the rights of the patentee under the patent) that we must look for the true extent of those rights.

The present invention has four points; but it is with the fourth alone that we have to deal, and upon which any question arises. That is stated in the specification to be, "Fourthly, the use of carburet of manganese in any process whereby iron is converted into cast-steel." This statement does not in my opinion give to the patentee, as some of my learned Brothers seem to think, the exclusive right of using carburet of manganese in any and every possible process, or in any and every mode of using it, in order to convert iron into cast-steel; but it only gives to the plaintiff such an exclusive right as regards such process or processes as he afterwards further describes, declares, and makes known

for the benefit of the public, and such other similar processes as are reasonably within the description, according to the then state of knowledge; also he is protected against fraudulent imitations, or evasions of, or substitutions of equivalents in, his process or processes, as specified. And the process he gives to the public, and which is the process protected by the patent, is, mixing from one to three per cent. of carburet of manganese with fragments of common blistered steel, or mixtures of cast and malleable iron, &c., &c.

Now, the defendant does not use carburet of manganese at all. He seeks to obtain the result by a process obviously not the same as the process stated in the specification. It is not described there, and it is not to be inferred from the description that it is to be found there, according to the then state of knowledge at the date of the patent. There is, therefore, clearly no direct infringement of the patent.

*Then, is there any fraudulent imitation, or evasion, or substitution of a chemical equivalent, so as to create an indirect [*762 infringement of the patent? There is no evidence of fraudulent imitation or evasion. It is not suggested that there is any such; and it has not been suggested by any of the counsel that the case can be put upon that ground. And, as to the substitution of an equivalent, I entirely agree with my Brothers Alderson and Coleridge (referring to their judgments as given in the Court of Exchequer Chamber), that the patent (as explained in the specification) covers and protects, not only the process actually specified, but any process with chemical equivalents known as such at the date of the patent, but not chemical equivalents discovered afterwards; for, this would be giving the patentee, not only the benefit of his own discovery, but the benefit of the discoveries of other persons subsequently to the date of the patent. The process used by the defendant was not known as a chemical equivalent at the date of the patent. If it was known, the plaintiff was guilty of a fraud on the public in concealing it, and in omitting to mention it as a better and cheaper method of accomplishing his object. But, as against the plaintiff, it must be taken that it was not known; and, indeed, the evidence clearly shows that it was not known. Then, assuming it to be a chemical equivalent (which after all is only a matter of conjecture, by chemical witnesses speculating what may occur in the inside of a red-hot crucible), it is not a chemical equivalent that was known to scientific persons at the date of the patent; and it stands, therefore, on the footing of an entirely new discovery, and therefore the use of it is not an indirect infringement of the plaintiff's patent. The consequence is, there is no evidence of any infringement of any sort, direct or indirect.

I would, however, add (as has been already mentioned by one of my learned Brothers), that it appears to me a *very incorrect expression to speak of the defendant's process as the substitution of a [*763 chemical equivalent. The defendant does not use the plaintiff's process,

substituting a chemical equivalent for that which the plaintiff uses, but he appears to me to use a different process altogether.

The above opinions were ordered to be printed, and the House adjourned the consideration of the question until the present session, when their decision was pronounced as follows:—

Lord CRANWORTH, C.—My Lords, this case arises upon a writ of error brought upon a judgment of the Court of Exchequer Chamber, by which that court awarded a venire de novo.

The defendant in error, Heath, who was the plaintiff below, brought an action against Unwin, the plaintiff in error, for an infringement of his patent. The declaration states the grant of letters-patent for an improvement in the manufacture of iron and steel. The patent was granted upon condition of enrolling the specification within six calendar months; and the declaration states that the plaintiff below did enrol the specification accordingly. It then states the infringement by the defendant Unwin, and claims damages

To this declaration there were several pleas. The only plea that we need consider is the plea of Mr. Unwin, of not guilty,—that he has not infringed the letters-patent.

At the trial, the plaintiff gave in evidence the specification, by which he claimed as part of his invention, as follows:—“Lastly, I propose to make an improved quality of cast-steel, by introducing into a crucible bars of common blistered steel broken as usual into fragments, or mixtures of cast and malleable iron, or malleable iron and carbonaceous *764] matters, along with from one *to three per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, which are, when fluid, to be poured into an ingot-mould in the usual manner. But I do not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of my invention, but only the use of carburet of manganese in any process for the conversion of iron into cast-steel.”

The question is, whether there was evidence that the defendant infringed that part of the plaintiff's invention.

Now, carburet of manganese is a metallic substance, stated by one of the witnesses to be of the value of 7s. or 8s. per lb. Specimens were produced to your Lordships. There was no evidence that this substance was ever used by the defendant: indeed, it certainly was not. But there was evidence, or, rather, it was admitted by the defendant, that he used oxide of manganese and carbonaceous matter. The admission is as follows:—“Upon the trial of the said issues, it was admitted between the plaintiff and the defendant, that, since the date of the patent, the defendant had manufactured cast-steel, by using oxide of manganese and carbonaceous matter, introduced into the pot at the same moment with the steel; the said three ingredients,—oxide

of manganese, carbonaceous matter, and steel,—being introduced all at once, but each of the said ingredients being at the time of such introduction separate and apart from, and not in combination with, any of the others.” The question is, whether this was substantially the use of the substance described in the specification as carburet of manganese.

The evidence showed that carburet of manganese was produced by lining melting-pots with charcoal, mixing oxide of manganese with coal-tar, then putting it into *the pot, and exposing it to excessive heat. There was evidence to show, that, for a short time [*765 after the date of the patent, the plaintiff below used the carburet of manganese in the manufacture of steel in the mode described in his specification; but that it was soon discovered by his workmen that the same result might be attained by using, instead of the carburet of manganese, the substances by means of which that carburet was obtained, i. e., by placing in the melting-pot together with the steel while it was in the process of being melted, a paste made with coal-tar and oxide of manganese. The evidence went further to show that the chemical effect of this use of the paste would be to generate, in the process of melting, carburet of manganese in a fluid state, which would then unite with the melted or melting steel, and so produce results the same as had flowed from the use of the solid carburet. The witnesses stated, that, after this discovery had been made, the use of the solid metallic carburet was altogether discontinued,—as must obviously be the case, the cost of a pound of the paste being only about three farthings, and the process being therefore at once far less expensive and more simple. The substances which the defendant admitted he had used, that is, oxide of manganese and carbonaceous matter, were in fact the same as the paste used by the plaintiff. And the question, therefore, was, whether the use of the two substances of which the paste was composed, was the same thing as the use of the carburet.

The learned judge at the trial held that it was not, and thereupon directed the jury, that the evidence, even if believed by them, would not entitle the plaintiff to a verdict. To this direction the plaintiff excepted: and, the bill of exceptions having been argued before the Court of Exchequer Chamber, four out of the six judges by whom the case was heard disagreeing with the law as *laid down at the trial, the exceptions [*766 were allowed, and a venire de novo was awarded.

The defendant below then brought the matter by writ of error to this House: and the question was elaborately argued, at the close of the last session of parliament, at your Lordships' Bar, when we had the benefit of the assistance of eleven of the judges, whose opinions have been printed, and are now before your Lordships. Seven of the judges concurred with the judgment of the Exchequer Chamber, and four disagreed. Mr. Justice Coleridge, one of the two judges who were in the minority in

the Exchequer Chamber, was not present at the argument in this House, and we are not therefore able to say whether he would have adhered to his former opinion or not.

In this conflict of opinions, the duty devolves upon us of finally deciding the question.

My Lords, I confess, that, after anxiously considering the case, my judgment coincides with that of the minority of the learned judges.

The invention for which the patent was granted, was, according to the language of the specification, a mode of "making an improved quality of steel, by introducing into a crucible bars of common blistered steel along with from 1 to 8 per cent. of their weight of carburet of manganese." It is certain that this process was not adopted by the defendant. He never used such a substance as carburet of manganese at all. And if, therefore, what he did amounted to a violation of the patent, it must be because he used a substance or a combination of substances, which, in the process of fusion, generated carburet of manganese; so that he indirectly, though not directly, used the substance on the use of which the plaintiff's invention was founded.

It must, I think, be assumed, that, in the course of the process
*767] adopted by the defendant, carburet of *manganese in a liquid state was generated. There was evidence from which the jury might reasonably infer such to be the case: and, if the use of substances thus producing carburet of manganese in a state of fusion was a violation of the plaintiff's patent, the learned judge at the trial ought not to have told the jury, as he did, that there was no evidence on which they could find a verdict for the plaintiff.

But I think that the use of substances thus producing carburet of manganese in a state of fusion, was no violation of the patent. The substance for the use of which (*inter alia*) the patent was granted, was, a solid metallic substance capable of being broken into fragments and weighed; so that certain definite quantities might be put into the crucible with the steel. There is no evidence whatever tending to prove, that, at the date of the patent, it was known to persons acquainted with the subject of manufacturing steel, that coal-tar and oxide of manganese would be a chemical equivalent for the carburet of manganese claimed by the plaintiff. Indeed, it is obvious that the discovery of such an equivalent was made after the use of the carburet as a distinct metallic substance had been some short time in operation. It was itself a most valuable discovery, and would have legitimately formed the subject of a new patent. The costly nature of the substance claimed in the patent might, and probably would, have prevented its use altogether. And if, at the date of the specification, it was known to the plaintiff, that, by the use of two common substances well known in commerce, more than one hundred-fold cheaper than carburet of manganese, the same results pre-

cisely would be obtained as by the use of that material, the specification would have been bad, as not truly disclosing the invention.

On the short ground, therefore, that the invention claimed is for the use of a particular metallic substance, *viz. carburet of manganese, [768 in certain definite proportions according to the weight of the steel under fusion, and that no such substance, nor any equivalent for it, known to be such at the date of the specification, was used by the defendant, I think that there was no evidence of infringement; so that the ruling of the learned judge at the trial was correct.

I therefore think that there ought to be judgment for the plaintiff in error; and I shall move your Lordships accordingly.

LORD BROUGHAM.—My Lords, in this case the question was respecting the infringement of a patent the specification of which, taken with the patent itself (which title, as one of the learned judges observed, gives as little information as possible prior to the publication of the specification), showed that the invention, the infringement of which is complained of in the action now brought to your Lordships' Bar, consists of exposing, with from one 1 to 3 per cent. of their weight of carburet of manganese, fragments of iron in a crucible, at the proper heat for melting the materials. And the disclaimer of the patentee states that he does not "claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention; but only,"—and here is the gist of the invention, as specified,—“the use of carburet of manganese in any process for the conversion of iron into cast-steel.” Then he proceeds, in the last place, to claim the employment of carburet of manganese in preparing an improved cast-steel.

The question, therefore, is, whether there was here evidence to go to the jury of an infringement of the right granted by this patent, by the defendant below, the plaintiff in error, by the use, not of carburet of manganese, but of oxide of manganese and carbon, *which it was [769 contended was equivalent to using carburet of manganese, inasmuch as carburet of manganese is admitted to be a compound of carbonaceous matter (or, call it carbon) and manganese, and oxide of manganese containing manganese and carbon exhibited to that oxide of manganese, and, uniting with the manganese, forming carburet of manganese,—it is contended for the plaintiff below, the defendant in error here, that the employment of carbon, or, rather, of carbonaceous matter (for, when we speak of carbon, we speak of an ideal substance rather than of any matter actually existing in nature), of matter containing the carbonic principle, in combination with oxide of manganese, says the evidence,—upon which I shall say a word presently,—at the instant of fusion, at the instant of the entering of the iron into combination with the other matters, forms carburet of manganese. And this, it is said, is equivalent to the employment of carburet of manganese in the process, and consequently is an infringement of this patent.

The question is, whether that ought to have gone to the jury as evidence of the infringement of the patent. I am of opinion that it ought not so to have gone to the jury, because it was not an infringement of the patent.

I agree with what my noble and learned friend has said as to the obligations we are under to the learned judges,—which would, no doubt, appear to be still greater, though not in reality so (for, what I am about to say does not detract from the value of their opinions), if no such gross error had occurred in the statement of the opinion of one of the learned judges,^(a) as that of putting “carburet of manganese” (which is clearly a blunder), instead of “oxide of manganese.” In the 11th *770] page of the printed opinions of the learned judges, *Mr. Justice Maule says: “The whole process of the plaintiff (that is, the defendant in error), so far as it is new, consists of putting carburet of manganese into the pot with the usual articles from which cast-steel is produced; and the whole of the defendant’s process (that is, the plaintiff in error) consists in a similar use of a mixture of carbonaceous matter and *carburet* of manganese.” Past all doubt, if this process consisted of a superfluous mixture, but still a mixture, of carbonaceous matter with carburet of manganese, that would be an infringement of the patent. But it clearly must be meant, “a mixture of carbonaceous matter and *oxide* of manganese.” It is perfectly absurd to suppose that it could mean anything else. I mention that in passing, because it is doing great injustice to my right honourable and learned friend, Mr. Justice Maule, to suppose that he meant to state anything so utterly inconsistent with his whole argument. Probably it is the printer’s mistake, he having put “carburet” instead of “oxide” of manganese.

Then, the question is, whether that mixture of two substances, viz., carbonaceous matter and oxide of manganese, and of which it is possible that carburet of manganese may be formed, and out of which, say some of the witnesses, scientific men, it is formed, in a crucible, at the instant of the union of the matter of iron with the other matters; at the instant, as it were, of the nascent state (if I may so speak,—using a well-known chemical expression) of the compound of cast-steel, this mixture takes place, and carburet of manganese, say those witnesses, is formed. I confess that I very much lean towards the doubt upon this subject which is expressed by the learned Chief Baron, who says that he can hardly see how those learned and experienced witnesses could look into the red-hot crucible in order to discover that it was at that *771] particular instant of time that the union *took place, and that the materials of carburet of manganese did form actually carburet of manganese, so as to make it in fact true that carburet of manganese was formed in the melting-pot at the instant of the union of the ferruginous matter with the manganese.

(a) Mr. Justice Maule, *antè*, p. 754.

But, however, I pass that by, because, be that as it may; supposing it to be true, which I gravely doubt, that any one could form any satisfactory opinion upon it,—supposing it to be true, that, eo instanti of the combination of the ferruginous matter with the manganese, carburet of manganese was formed by the fusion of those substances together, the carbonaceous matter and the oxide of manganese, from which might come,—and we will take it for granted did come,—the material of carburet of manganese, the union of these materials consequently making carburet of manganese in the operation; I say, be that so, admitting all this,—and it is a somewhat liberal admission, in my apprehension, to the argument for the defendant in error,—but, admitting this in favour of the infringement, I still hold that there is here no infringement; for, the process claimed, is, making cast-steel, by exhibiting to the iron in fragments from 1 to 3 per cent. of carburet of manganese.

Now, as my noble and learned friend has well observed, carburet of manganese is a known substance, an article of commerce, known in the shops as such, and bearing a particular price, a price incomparably different from the price of the other articles now in question. But, are you to hold, as a general principle to be maintained, that whoever obtains a grant of a patent, a grant of a monopoly for the use in any process of any substance, is protected by that grant from any attempt on the part of any person, or any successful process on the part of any person, to attain the same object, by using, not that substance for the use of which he has obtained the patent, not that substance the use of which in the *process constitutes his monopoly, and is the monopoly granted to him by the patent, but the component parts or [772 elements of that substance,—those parts of which that substance, when analyzed, is found to consist,—those parts out of which you might synthetically, by a reversed process, compound that substance,—is it to be said that the patent right, the monopoly, extends to that, and that any use of the materials of which that substance may be compounded, is therefore an infringement of the patent? I cannot go so far as that; nor do I see that any of the authorities cited go so far as that.

I come at once to the case which is chiefly relied upon, viz. *Stevens v. Keating*, which came before Lord Cottenham, in which, the patent being for making cement by uniting gypsum with an acid and an alkali, the defendant made cement (which was the alleged infringement) by uniting gypsum with borax; and, it being discovered that borax was composed of an acid and an alkali, Lord Cottenham held, that uniting gypsum with borax was uniting gypsum with an acid and an alkali, and that consequently there was an infringement of the patent which was granted for gypsum united with an acid and an alkali.

Now, I will not, at present,—because I do not think it at all necessary,—express any doubts upon the soundness of the view there taken by Lord Cottenham. But I will ask what Lord Cottenham would have

said, if the converse had been the case,—which would bring us nearer to the present case. What Lord Cottenham's judgment in that case would have been, does not appear certainly upon the account that I have seen of the judgment on the case before him. But I very much question whether his judgment would have been in the affirmative, upon the question of infringement or no infringement, if, instead of the *773] patent being for uniting *gypsum with an acid and an alkali, the patent had been for making cement by uniting gypsum with borax,—and, it being found that borax was compounded of an acid and an alkali, it then had been contended that any compounding of an acid and an alkali was an infringement of the patent, inasmuch as the materials of borax being an acid and an alkali, and the patent being for combining an acid and an alkali with gypsum to make cement, therefore there was an infringement. In my opinion, the proposition affirmed by Lord Cottenham, in this decision, would not at all lead, by any necessity whatever, to giving a similar decision upon the converse, where the case was such as I have just supposed.

Now, just let us consider how far this doctrine will hold. We will take an example,—you might refer to almost any matter of chemical compound, any case of elective attraction, and more particularly any case coming near the present case, of double elective change. You might refer to almost any one to illustrate it. I only refer to examples by way of illustration; and I am about to refer to facts perfectly notorious to all persons however moderately acquainted with chemical science. Take this case:—Glauber salts is a perfectly well-known compound of what is now called sulphate of soda, which is a well-known compound of sulphuric acid (formerly called oil of vitriol) and soda. Suppose a patent had been taken out for the use of glauber salts in the manufacture of any patent medicine, and suppose, that, instead of using glauber salts, a person who was minded by a different process to arrive at the same kind of medicine, had betaken himself to another process founded upon the fact of the composition of glauber salts being of that acid and that alkali, and supposing he had taken, I will not say an acid,—though I might take the instance of an acid,—but, supposing he had described his newly-invented *774] drug as composed of soda and other materials *(which we are to suppose to be analogous to the steel used in this case), that the other material of his drug had been ardent spirits, naphtha, or alcohol, or any other matter of that sort, and that he had exhibited to that sulphuric acid,—in that case, I should say, that although sulphuric acid exhibited to the mixture of alcohol and soda would lead probably to the formation of vitriolic ether, sulphuric ether, in one respect, but would, there can be very little doubt, in another respect, produce sulphate of soda, I do not think that that would have been an infringement of the patent. A very bad drug in all probability would be produced,

and probably its use would give considerable confirmation to the jocose answer once made by a friend of ours at the Bar to a medical man, who, complaining that he had been engaged in law proceedings, said he did not find that our profession made angels of men: "No, but yours does," said the learned counsel; "that is the difference between our professions;" the one does not improve their character here, but the other, according to his idea, had a tendency to remove them from hence to another state of existence. Probably this drug which I am supposing to be made, would very much tend to produce that effect.

But I will now take another case. Supposing, instead of exhibiting sulphuric acid to soda and alcohol, and thereby getting glauber salts in one way or another, it had been an exhibition to alcohol of sulphuret of soda, that is to say, a compound of sulphur and soda, and that that sulphuret of soda, with the alcohol, had been exposed to heat: I will suppose such a blast of hot air, or the flame of a blow-pipe, driven upon the sulphuret of soda as should produce combustion of the sulphur, and consequently give rise to the formation of sulphuric acid, and, the soda being present, of sulphate of soda: can anybody say that that would have been an **infringement* of the patent, which was [**775* a patent for the exhibition of glauber salts merely, because, by the elective attraction of the substances exhibited to one another, the combustion of the sulphur had given rise to sulphuric acid, and the sulphuric acid had united with the soda, and produced sulphate of soda, which is equivalent to glauber salts? The answer to that would be, The patent is for glauber salts: we are told by this specification that the process is, to exhibit glauber salts for making the medicine in question. The party wishing to use the invention, and to infringe it, or to do what was alleged to be an infringement of it, would have said,—
 "No. I cannot use glauber salts; I know that well enough, because the specification claims the exclusive use of glauber salts: but I am not excluded from using sulphur; I am not excluded from using soda; I am not excluded from mixing sulphur and soda together with alcohol, and combining them with the oxygen of the atmosphere, in order to get sulphuric acid, and thereby to make something of the same sort as the medicine in question: I am, therefore, free to do that, though I am not free to use glauber salts."

I will suppose the same thing precisely in another case,—as to nitre. Suppose an invention of gunpowder. In the specification, you take so many parts of nitre, and so many parts of carbonaceous matter, and so many parts of sulphur, and mix them all together. If a person, instead of that, were to use that out of which nitre is made,—if he were to take some compound of potash, say muriate of potash (the old name of which, I think, was, *sal febrifugium*), and he were to exhibit to muriate of potash that which contains nitrous acid, the nitrous acid, or nitric acid, having a stronger affinity for potash than muriate of potash has, the

nitric acid exhibited to the muriate of potash would unquestionably produce nitrate of potash. That is a single elective attraction. *776] *But you must take the case of a double elective exchange, by taking nitrate of ammonia, or some other composition of nitric acid, or some other basis, and, exhibiting that composition to muriate of potash, and thereby by a double elective exchange you may make the nitric acid take possession of the potash, and precipitate muriatic acid, so as to create nitrate of potash,—would any one say that that was an infringement of a patent which consisted in using nitre, carbon, and sulphur? It is perfectly clear that it would be no such thing.

My Lords, I am quite aware, that, with respect to all these cases which one may put, it may be said, this is to a certain degree *idem per idem*. I deny that. I do not think it is so: but, at all events, this tends to illustrate the proposition with which we are now concerned.

I have to add, my Lords, that, in one or two observations of the Lord Chief Baron, I entirely concur. I particularly speak of one, in which I take precisely the same view with him; that is, his last remark as to chemical equivalents. I am of the same opinion with him, that the defendant does not use the plaintiff's process, substituting a chemical equivalent.

My Lords, I am therefore very decidedly of opinion that this judgment cannot stand, as I must say, with the greatest respect for the learned judges, I have been throughout the whole of the argument, from the moment that I first apprehended what the point was that was under discussion at the Bar. I never could entertain any doubt; though I was a little shaken at first by the case before Lord Cottenham, to which I have adverted, till I came to look at it a little more closely. But, even if it were necessary to overrule that case of *Stevens v. Keating*, I should be prepared to say that I do not go along with Lord Cottenham in that decision: *777] *but, at the same time, I am perfectly clear that it is not at all applicable to this case. I expressed grave doubts as to its soundness; but I am equally, or more, clear, that what he laid down in that case would not apply to this case, and ought not to weigh in the decision here. Therefore I am clearly of opinion, with my noble and learned friend, and, I am sorry to say, with the minority of the learned judges, that this judgment cannot stand, but that judgment ought to be given for the plaintiff in error.

Judgment for the plaintiff in error.

If an invention is an improvement in the principle of a machine for which a patent has been granted, it is not a violation of the patent; if it is an improvement in the form, it is such a violation: *Park v. Little*, 2 Wash. C.

C. Rep. 196. And see the cases which have been decided in regard to the infringement of Woodworth's Planing Machine: *Woodworth v. Wilson*, 4 Howard S. C. Rep. 712; *Gibson v. Betts*, 1 Blatch. C. C. Rep. 168; *Van*

Hook *v.* Pendleton, Ibid. 187; Gibson *v.* Van Dresor, Ibid. 532; Brooks *v.* Fiske, 15 Howard, S. C. 212.

Where a person held a patent for an improvement in making friction matches, the invention being only a new combination of old materials before in use, consisting of a composition formed of phosphorus, with the earthy material and the glutinous substance only, without the presence of chlorate of potash or of any other like objectionable ingredient; it was held that any person may use any one or all the materials forming the combination, in making matches, provided he does not use them in the combination patented, or that any one may lawfully use them for such purpose, in combination with chlorate of potash, as they were formerly used: Byam *v.* Eddy, 24 Vermont, 666. But a mere colourable difference or slight variation of the combination would not exempt a person from the charge of infringement: Ibid.

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1. A. having sued B. in the Court of Queen's Bench for rents and royalties alleged to be due from B. to A. upon an indenture of lease of the 20th of February, 1840, whereby A. had demised to B. certain mines and veins of coal, &c., at and under certain rents and royalties therein mentioned, and whereby B. had entered into certain covenants with A. for the payment thereof and otherwise, and the action being about to be tried, an agreement was entered into as follows:—"In the Queen's Bench. Between A. plaintiff, and B. defendant. In consideration of your withdrawing the record in this action, I hereby undertake to pay you to-morrow morning the sum of 210*l*. by a check on my bankers, in addition to the sum of 300*l*. for which B. has given his bills at one, two, and three years' date; you hereby undertaking to discharge B. from all further liability to the rents and covenants of the lease which is the subject of this action, upon his assigning to you all his estate and interest in such lease." This was signed "C.," and addressed to "A.," and under it A. wrote and signed the following,—“I accept of the within mentioned terms of settlement, and undertake to perform my part of the within arrangement.”

In an action by B. against A. for a breach of this agreement, the declaration alleged the agreement to have been made "between B., by one C., his agent in that behalf, and A."

(779)

It then went on to aver, that, in pursuance of the said agreement, the record in the said action was withdrawn and the 210*l.* paid, and that B. was always ready and willing to do and perform all things on his part to be performed, to entitle him to be discharged by A. from all further liability to the rents and covenants of the said lease, of which A. had notice, and that, before the committing of the grievances, B. offered to assign to A. all his estate and interest in the lease, and requested him to perform the agreement on his part; but that A. refused to do so, and wrongfully discharged B. from making such assignment, and afterwards, in breach of the agreement, charged B. with further liability on the covenants of the lease, and sued him thereon, and recovered judgment, and issued execution thereon.

To this declaration, A. pleaded,—fifthly, that B. did not assign to him all his estate and interest in the said lease.

Twelfthly, that, before the making of the agreement in the declaration mentioned, B. by deed, dated [the 24th of March, 1840, demised the said mines and veins of coal, together with the indenture of lease, and all benefit and advantage thereof, to C., for the residue of the term thereby created, wanting one day, with a power of sale in default of payment to C. of 3000*l.* in manner therein mentioned; that, before the making of the agreement in the declaration mentioned, by an indenture of the 25th of March, 1840, B. granted to C. an annuity or yearly rent-charge of 275*l.* charged upon the premises demised by the lease of the 20th of February, 1840; that default was made in payment of the 3000*l.*, and that C., in exercise of the power of sale, sold all the interest in the said mines and veins of coal which he took under and by virtue of the underlease and mortgage of the 24th of March, 1840; that, at the time of the making of the agreement in the declaration mentioned, B. knew of the said sale by C., but that A. had no notice or knowledge whatever of the said underlease and mortgage, or the grant of the annuity to C., or of the said assignment by him in exercise of his said power of sale, or that B. had not full power to assign the said lease of the 20th of February, 1840, and the term thereby created, unaltered and unencumbered; and that B. never assigned, or offered to assign, to A., the said lease in the agreement mentioned, and his estate and interest therein, free from and unencumbered by the said underlease and assignment thereof and the said annuity.

Fourteenthly, that, after the making of the agreement, B. not having assigned his estate

and interest in the lease therein mentioned, and the rent and royalties being in arrear, A. sued B. in the Exchequer for the recovery of such arrears and in respect of divers breaches of covenant, and obtained judgment against him; that afterwards, and whilst the said judgment remained unsatisfied, B. filed a bill in Chancery against A. for a specific performance of the agreement, and for an injunction to restrain him from proceeding at law, and for a release from the covenants of the lease; that, after a reference to the master, the Court of Chancery decreed that B. should pay A. a certain sum, that A. should be restrained from proceeding on the judgment so obtained by him, and that certain costs should be paid by A.; that A. paid the costs, and performed the decree; that all the causes of action in the declaration in this cause mentioned existed, and B. had notice thereof, at the time of filing the bill; that the subject-matters of complaint in this action and in the bill were the same; and that the decree in the suit in equity was a final decree and adjudication between the parties.

Fifteenthly, a similar plea to the fourteenth, under the 83d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, concluding with an averment, that, according to the rules and practice of the Court of Chancery, after such final decree and adjudication so made, A. was, and the defendants, as his executors, were, and would be, entitled to relief on equitable grounds against a judgment if obtained for B. in this action:—

- Held,—first, that the action was well brought by B., it being averred, and not denied, that C., in making the agreement, did so as agent and on behalf of B. *Phelps v. Prothero*, 379
2. Secondly, that the declaration was not bad for want of a specific averment that B. had either immediately or within a reasonable time after the making of the agreement tendered or executed an assignment of his estate and interest in the lease; but that it was enough to allege that he was ready and willing to do so, and to aver generally that he had done all things, and all things had happened necessary to entitle him to maintain the action. *Ib.*
 3. Thirdly, that the fifth, twelfth, and fourteenth pleas afforded no answer to the action. *Ib.*
 4. Fourthly, that the fifteenth plea disclosed no defence to the action upon equitable grounds,—the defendants' remedy, if any, being by application to the court of equity, to restrain the plaintiff from proceeding at law and in equity in respect of the same causes of complaint. *Ib.*

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By an order made under the compulsory power given by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 3, "a cause" was referred, nothing being said about costs. The umpire, by his award, "adjudged that the defendants should pay to the plaintiff 150*l.* 0*s.* 9*d.*, in full of all demands in the above-mentioned action." The award was accompanied by a note from the umpire to the plaintiff, on a separate piece of paper, but not annexed to the award, in which the umpire expressed an opinion that the costs of the action, and of the reference and award, should be paid by the defendants, and that he would have so ordered, but that he could not do so, inasmuch as the order of reference was silent as to costs:—Held, that the parties were to be bound by the award, and that the accompanying note could not be looked at. *Leggo v. Young*, 525

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Where an arbitrator to whom all matters in difference in a cause are referred, professes by his award to deal with the whole matters, it is no objection that he omits specifically to dispose of one of the matters in difference, if

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1. An action having been brought in the names of twelve persons who had formerly been shareholders and adventurers in a mine, upon instructions given to the attorney by one who alleged himself to be purser of the mine, and as such authorized to sue on behalf of the adventurers, three of the plaintiffs obtained judges' orders to strike out their names, on the ground that they had no interest in the matter, and that their names had been used without their knowledge or consent.

These orders were obtained on the 19th of September, 1854,—after the cause had been taken down for trial, and the defendant had consequently become entitled to costs of the day, on the withdrawal of the record.

On the 5th of May, 1855 (three days only before the end of Easter Term), the defendant obtained a rule calling upon the three plaintiffs whose names had been struck out, to show cause why the orders for that pur-

pose should not be rescinded, and upon the attorney to show cause why he should not pay the costs already incurred, and give security for the future costs :—

- Held, that the application was too late for either purpose. *Collins v. Johnson*, 588
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- A. entered into a recognisance of bail for B. on the removal by certiorari of an indictment for conspiracy from the Central Criminal Court to the Queen's Bench. B. was convicted, and the recognisance was estreated *for the non-payment of the prosecutor's costs* :—Held, that A. might maintain an action against B. as upon an implied indemnity. *Jones v. Orchard*, 614

BANKRUPT.

I. Proof of Debts.

- Contingent Liability.*—A. being indebted to B., assigned to him a policy of assurance on his life, and covenanted to pay the annual premiums, and, in case he did not, and A. should pay them, he would repay him the amount with interest, on demand. B. afterwards became bankrupt, and obtained his certificate. A premium accruing due after the bankruptcy, and being unpaid by B., and A. having paid it, and not being repaid :—Held, that B. was not discharged, by virtue of the 12 & 13 Vict. c. 106, ss. 178, 200, from liability for the breach of the first of these covenants, but that he was discharged quoad the breach of the second covenant. *Young v. Winter*, 401
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- Quære*, whether a copyhold tenant, who has become bankrupt, can be guilty of a forfeiture by disclaiming to be tenant of the manor, after a conveyance of his interest in the premises to a purchaser under the fiat? *Clarks v. Arden*, 227

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- A. came was tried before Lord Truro when Chief Justice of this court, and a bill of exceptions tendered, and the draft thereof submitted to his Lordship; but, in consequence of his elevation to the woolsack, and

subsequent illness, all hope of getting it settled and sealed being at an end,—The court directed a new trial. *Benett v. The Peninsular and Oriental Steam-Boat Company*, 29

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- It is a good defence to an action by the endorsee against the acceptor of a bill of exchange, that it was accepted for the accommodation of the drawer, without consideration, and that it was endorsed over by the drawer after it had been paid by him at its maturity. *Parr v. Jewell*, 684

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Construction of s. 220.

- A local act of 6 G. 4, c. clxxix., for the management of the poor of Brighton, by s. 204, empowered the directors and guardians, when and as they should find it necessary, to alter, enlarge, extend, and repair the existing poor-house, or to erect other houses or buildings for the better receiving, employing, and maintaining the poor: and s. 220 provided that all contracts or agreements made between the directors and guardians and any other person or persons relating to "any act, matter, or thing to be done in pursuance of that act," should be reduced into writing, and signed by the parties thereto. By the poor law act of 7 & 8 Vict. c. 101, the commissioners are for the first time empowered to direct that schools shall be built in parochial districts :—

Held, that a contract made by the directors and guardians, by order of the poor law commissioners, in relation to the erection of an industrial school within the parish, was not a contract for "a thing to be done in pursuance of the local act," and therefore was not required by the 220th section of that act to be in writing. *Armstrong v. Bowdidge*, 358

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- Prior to the statute 18 & 19 Vict. c. 42, an affidavit sworn before the British consul at Paris, was not admissible in our courts. *In re Anne Cooper*, 225

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CASE.

- I. Against Carriers for Loss of a Passenger's Luggage.*
 The plaintiff, a passenger by railway, brought

with him into the carriage a carpet-bag containing a large sum of money, and kept it in his own possession until the arrival of the train at the London terminus. On alighting from the carriage with the bag in his hand, the plaintiff permitted a porter of the company to take it from him for the purpose of securing for him a cab. The porter, having found a cab (within the station), placed the carpet-bag on the footboard and then returned to the platform to get some other luggage belonging to the plaintiff, when the cab disappeared, and the carpet-bag and its contents were lost:—Held, that this was a loss by the negligence of the company, for which they were responsible in damages. *Butcher v. The London and South-Western Railway Company*, 13

II. For Negligence.

In an action for an injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured,—the evidence was, that many persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from a street to the main road, by avoiding an angle; but that the owner of the premises, as often as he saw them, turned them back:—Held, no evidence to go to the jury of a "public way." *Stone v. Jackson*, 199

And see RAILWAY COMPANY.

CENTRAL CRIMINAL COURT.

Jurisdiction of.

1. This court has no power to grant a habeas corpus to bring up a prisoner who has been convicted at the Central Criminal Court, on the ground that the offence charged was committed at a place out of the jurisdiction of that court. *In re Francis Robert Newton*, 97
2. The proper course is, to apply to the Attorney-General for his fiat for the allowance of a writ of error coram nobis, the granting or withholding of which is matter for his discretion. *Ib.*

CERTIORARI.

See BAIL.

CESTUI QUE TRUST.

See TRUSTEE.

CHEMICAL EQUIVALENTS.

See PATENT.

CLERGYMAN.

Queen's Chaplain.—See PRIVILEGE.

COMMISSION.

To examine Witnesses.—See EVIDENCE, I.

COMMON LAW PROCEDURE ACT, 1852.

(15 & 16 Vict. c. 76.)

- s. 59. General averment of performance of conditions precedent, 370
- s. 75. Pleadings taken distributively, 684
- ss. 179 et seq. Pleadings in ejectment, 323

COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 Vict. c. 125.)

- ss. 3—8. Compulsory reference, 62f
- s. 45. Affidavits in answer to "new matter," 494, 554
- ss. 46, 48. *Viva voce* examination, 256
- s. 83. Equitable defences, 206, 323, 370

COMPANY.

See RAILWAY COMPANY.

COMPROMISE.

See ATTORNEY, II.

CONCURRENT PROCEEDINGS.

See COSTS, III.

CONDITION PRECEDENT.

See INDEMNITY.

PLEADING, V.

CONSENT.

In Writing by an Agent.—See DRAMATIC COPYRIGHT.

CONTINGENT REMAINDER.

See DEVISE.

CONTRACT.

Construction of.

1. The defendant, by bought and sold note, contracted to sell to the plaintiff "about 500 tons nitrate of soda, in bags, of good merchantable quality," to be ready for delivery by a given day, at a certain price and upon certain terms and conditions. The contract then proceeded,—“It is understood that the above nitrate of soda is to form the full and complete cargo of the *John Phillips*, 345 tons register, now on her passage to Sydney, to proceed thence without undue delay to the west coast of South America, there to load the above. In the unexpected event of the *John Phillips* getting ashore, or being unable to prosecute her voyage, from any casualties of the sea, then the seller agrees to deliver, and the buyer agrees to take, in lieu thereof, another cargo or cargoes of about equal quantity, to be named at the earliest practicable period prior to arrival off the coast. The only ground on which the seller is to be excused delivery of the above nitrate of soda, is, the loss of the said vessel (or that which may be substituted for it) on her homeward voyage; in which case this contract is to be

considered void, but in no other event whatever:—

Held, that this was an absolute contract for the sale of 500 tons (more or less), and not of a quantity limited by the capacity of the vessel named; though *semble* (per Maule, J.), that the incapacity of the John Phillips to carry the whole 500 tons would excuse the seller from bringing it all home by that vessel. *Bourne v. Seymour*, 337

2. Held also, that the contract did not amount to a warranty that the John Phillips should be of capacity to carry the whole 500 tons. *Id.*

3. In construing a written contract, the court will, if possible, so read it as to effectuate the intention of the parties, rather than defeat it. *Stratton v. Pettit*, 420

4. By "articles of agreement" between A. and B., it was witnessed that A. agreed to let, and B. agreed to take, certain premises then in the possession of B., for the term of five years; and A. also agreed to sell, and B. agreed to purchase, the fee-simple of the premises, to be conveyed to B., his heirs, &c., absolutely, at the end of the said five years, provided B., his heirs, &c., should have in the mean time quietly occupied, and not have been evicted from the premises; yielding and rendering by B. unto A., as well for the rent or use of the said premises for five years, as for the said purchase thereof, 70*l.* in and by 70 shares of 1*l.* each, in the Birkbeck Life Assurance Company, the receipt and delivery unto A. of the said shares of the value of 70*l.*, in full for the said rent and purchase, A. thereby admitted: And it was further agreed, that, should B. be legally ejected from the premises within or during the term of five years, A. should pay or refund to B., either in cash or in the said shares, at and after the rate of 7*l.* 10*s.* per annum for the portion of the term unexpired at the time of such eviction, and that A. should also indemnify B. against all loss and expense in maintaining possession. And it was further agreed that no abstract or investigation of title should be permitted or required beyond evidence of the seisin and possession as owner by A. and his ancestors for twenty-one years and upwards last past; and that B. should immediately do and execute all acts necessary to transfer and vest the said 70 shares in A.:—

Held, that the intention of the parties, to be collected from the language of the instrument, was, that it should take effect as a lease, and consequently that it was void, as such, by the 3d section of the 8 & 9 Vict. c. 106, not being by deed. *Id.*

5. Held also, that the production by A. of evidence of the seisin of himself and his ancestors for twenty-one years and upwards, was not a condition precedent to his right to

call upon B. to execute a transfer of the shares. *Stratton v. Pettit*, 420

And see INDEMNITY.

CONTRIBUTION.

In Case of Accidental Injury,—See RAILWAY COMPANY, 1*l.*, 2, 3.

COPYHOLD.

I. Leases under the Lord's License.

1. A lease granted by a copyhold tenant, under a license of the lord, is not affected by a forfeiture of the tenant's estate,—such license operating as a confirmation by the lord; and, consequently, pending the term created thereby, the lord cannot maintain ejectment for the land. *Clarke v. Arden*, 227
2. And it is competent to a purchaser of the tenant's interest in the copyhold tenement, who comes in and defends as landlord, and who is in receipt of the rents, to set up the lease as a bar to the lord's claim. *Id.*

II. Forfeiture.

Bankrupt.—*Quare*, whether a copyhold tenant, who has become bankrupt, can be guilty of a forfeiture by disclaiming to be tenant of the manor, after a conveyance of his interest in the premises to a purchaser under the fiat? *Clarke v. Arden*, 227

COPYRIGHT.

Proprietorship.—Piracy.

The plaintiffs were the proprietors of a weekly paper called "The Jurist," which consisted principally of reports of decisions in the various superior courts of law and equity, supplied by barristers employed by the plaintiffs for that purpose under a verbal arrangement to the effect that they should furnish reports of such cases as they thought desirable for publication in *The Jurist*, upon the terms of being paid a given price per sheet,—the reporters making no express reservation of a right to publish the cases themselves, and there being no express stipulation that the copyright should belong to the plaintiffs,—nothing, in fact, being said upon the subject. Attached to each report was a head-note consisting of a short or compendious statement of the decision in each case.

The defendants, who were the publisher and the proprietor of a work called "The Monthly Digest,"—a work published at the beginning of each month, and consisting of the side or marginal notes of all the reports published during the preceding month, including those published in *The Jurist*, analytically arranged under the appropriate heads or titles,—copied therein certain of the head-notes of the reports in *The Jurist*, as well as the marginal or side notes of the other

reports; the number of head-notes taken from *The Jurist* amounting to about one-twentieth of the whole of each monthly number of the Digest:—

Held,—upon a special case on which the court were to be at liberty to draw such inferences from the facts stated that a jury would be warranted in drawing,—first, that the plaintiffs had copyright in the reports so furnished to *The Jurist*,—secondly (*Maule, J.*, dissentiente), that the defendants were guilty of piracy. *Sweet v. Benning*, 459

And see **DRAMATIC COPYRIGHT.**

COSTS.

I. Verdict for less than 40s. on a Reference.

1. By an order of reference, in an action for an injury to the plaintiff's reversion by making a drain in his premises, a verdict was directed to be entered for the plaintiff, claim 500*l.*, costs 40*s.*, subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper,—the arbitrator to have all the same powers as the court or a judge sitting at *Nisi Prius*, and the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator.

The arbitrator by his award found all the issues in the action in favour of the plaintiff, except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages should be reduced to *one farthing*; and he further ordered the defendant to pay the plaintiff 5*l.*:—

Held, that the plaintiff was not, in the absence of a certificate under the 3 & 4 Vict. c. 24, s. 2, entitled to the costs of the cause; and, the postea having been erroneously made up with the following assessment of damages and costs,—“and the jury assess the claim of the plaintiff over and above his costs of suit to one farthing, and for those costs to 40*s.*,”—the court allowed it to be amended, by striking out the words in italics. *Cooper v. Pegg*, 264

2. Held also, that upon moving for the rule, it was not necessary for the defendant to bring before the court the order of reference, but that it was enough to show the award, which recited it; for, that, if there was anything in the order of *Nisi Prius* itself inconsistent with what was recited in the award, it was for the other side to show it. *Ib.*
3. By an order of reference, in an action for an injury to the plaintiff's reversion by making a drain into his premises, a verdict was directed to be entered for the plaintiff, claim 500*l.*, costs 40*s.*, subject to the award of a

barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper,—the arbitrator to have all the same powers as the court or a judge sitting at *Nisi Prius*, and the costs of the suit to abide the event of the award. The arbitrator by his award found all the issues in the action in favour of the plaintiff, except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages should be reduced to *one farthing*; and he further ordered the defendant to pay the plaintiff 5*l.*; and that the plaintiff should at his own expense make a certain drain:—

Held, that the plaintiff was not, in the absence of a certificate under the 3 & 4 Vict. c. 24, s. 2, entitled to the costs of the cause. *Cooper v. Pegg*, 484

II. Costs of Witnesses at the Assizes.

1. A cause was referred at the assizes at about three o'clock in the afternoon,—the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitration commenced at six o'clock the same evening, and all the witnesses were examined before twelve o'clock that night. The award was ultimately made in favour of the defendant, to whom the costs of the action were ordered to be paid, each party paying his own costs of the reference and a moiety of the expenses of the award:—Held, that a witness who did not arrive at the assize town until half past ten o'clock in the evening of the day of the trial, was not properly chargeable as a witness in the cause. *Fryer v. Sturt*, 218
2. Where a cause at the assizes is over at three o'clock in the afternoon, the witnesses may reasonably be allowed the following day for their return home, though their place of residence be distant only about fifty miles, and accessible by trains on the same evening. *Ib.*
3. Except under special circumstances, the expenses of the attendance of witnesses on the commission day at the assizes cannot be allowed. *Harvey v. Divers*, 497

III. Where concurrent Proceedings at Law and in Equity.

Proceedings having been taken here and in equity in respect of the same subject-matter, the plaintiff was put to his election by an order of the Court of Chancery, and elected to proceed with his claim there. A judge at chambers having made an order for the payment by the plaintiff of the costs of the action,—the court ordered it to be rescinded; holding that the defendant's remedy, if any,

was by application to the court of equity.
Simpson v. Sadd, 26

IV. Of Rules and Orders.

Costs of making a judge's order a rule of court.
Crowther v. Crowther, 177

V. Payment of, by Strangers to the Record.

To entitle a plaintiff in ejectment to call upon parties who are strangers to the record, to pay the costs, it must be clearly shown that the defence was conducted by them for their own benefit in the name of a pauper defendant: it is not enough to show that they are interested as equitable mortgagees of part of the premises, and that they have endeavoured to make terms with the plaintiff after judgment signed. *Anstey v. Edwards*, 212

COUNTY COURT.

I. Process of.

1. A "priest in ordinary of Her Majesty's chapels royal" is privileged from arrest on process from the county court, under the 9 & 10 Vict. c. 95, s. 99, for non-attendance on a judgment summons,—such process being in the nature of execution, and not merely process of contempt. *Ex parte Dakine, In re Swan v. Dakine*, 77
2. The proper mode of obtaining his discharge in such case, is, not by writ of privilege, but by habeas corpus from one of the superior courts (upon affidavits showing his privilege), or by application to the judge of the county court. 16.

II. Commitment after Discharge under the Insolvent Act.

A discharge under the insolvent debtors act does not prevent the party being committed by a county court judge, upon a judgment-summons, under the 9 & 10 Vict. c. 95, ss. 98, 99, in respect of an unsatisfied judgment, though inserted in the schedule. *George v. Somers*, 539

III. Particulars of Demand.

Upon an appeal from the decision of a county court, in an action for dilapidations, the case, without saying what the evidence given was, stated that the judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises, with the particulars in their hands, and would therefore be able to judge whether and to what extent the plaintiff had made out his case:—The court directed a new trial. *Smith, App., Douglas, Resp.*, 81

IV. Granting New Trial in.

Quere, whether a judge of a county court, having once heard and disposed of an application

for a new trial, can at a subsequent court rehear the matter and grant a rule? *Moseop v. The Great Northern Railway Company*, 580
And see LONDON SMALL DEBTS ACT.

COVENANT.

Restrictive,—See LEASE, I.

DAMAGES.

Measure of.

The plaintiff, a provision merchant at Morlaix, sent 314 casks of butter by the defendant's railway, marked A., and addressed "to order, at Brewer's Quay." The defendants, concluding from the fact of their having been in the habit of carrying butters similarly marked consigned to Messrs. A. & A., factors, in London, that these butters were intended for them, and having received directions from A. & A. to send all butters coming to them from Morlaix to Hibernia Wharf, delivered 154 of the casks at that place,—the remaining 160 having by accident got to Brewer's Quay.

C. & Co., the holders of the bill of lading, had received directions not to let A. & A. have the butters unless they accepted certain drafts at sight, which they declined to do; and, when C. & Co. applied to the defendants for information as to the 154 casks, they referred them to A. & A., and took no further notice of the transaction.

A. & A. afterwards sold the butters at the fair market price of the day, and rendered account-sales to the plaintiff; but, before the money was handed over, they suspended payment:—

Held, that the defendants were liable to the plaintiff for this mis-delivery, notwithstanding he had so far adopted the acts of A. & A. as to endeavour to obtain from them the proceeds of the sale; and that the proper measure of damages, was, the net amount for which the butters had been sold. *Sanquer v. The London and South-Western Railway Company*, 163

DEBTORS AND CREDITORS ARRANGEMENT ACT.

Construction of.

1. *Breach of Trust*.]—Upon an application at Chambers, under the debtors and creditors arrangement act, 7 & 8 Vict. c. 70, s. 6, to discharge a party who has obtained an order for protection, from execution for a demand owing at the date of his petition, it is competent to the judge to receive affidavits show that the order is invalid, by reason of the debt having been contracted by means of a breach of trust. *Hayne v. Robertson*, 554
2. Upon a conflict of affidavits, on a motion to rescind the judge's order in such a case, the court directed an issue to try the question. 16.

3. The court received affidavits in addition to those used before the judge, though containing facts within the knowledge of the applicant at the time the summons was taken out. *Hayne v. Robertson*, 554

DETINUE.

In detinue for a lease, the court allowed the defendants, upon a rule to plead several matters, to plead, in addition to a denial of the detainer, the following pleas:—

1. That the plaintiff sued the defendants for the detention of the lease, and recovered judgment, in a former action, and issued execution, and took other proceedings to enforce the judgment, that the sum of 150*l.*, to secure which the lease was deposited, was still due, and that no tender of that sum had been made since the judgment in the said former action, nor had any demand of the lease been made after the termination of the proceedings in the said former action:

2. For a defence on equitable grounds, as to the detention of the lease,—that it was deposited to secure payment to the defendants of 150*l.* and interest, by way of equitable mortgage, upon the terms of an agreement in writing,—the former recovery, and proceedings thereon,—that the 150*l.* was still due,—that, after the commencement of this action, the defendants tendered and offered to deliver up the lease to the plaintiff upon payment of the 150*l.*, and the defendants also tendered and offered the plaintiff his costs of this action up to that time,—and that such tender and offer were refused. *Chilton v. Carrington*, 206

DEVISE.

I. Construction of.

Contingent Remainder.—Testatrix devised as follows:—"I give and devise unto my son Thomas all that my freehold estate, situate, &c., to hold the same unto my said son Thomas for and during the term of his natural life; and, from and immediately after his decease, I give and devise the same unto the second son of the body of my said son Thomas, lawfully begotten, on his attaining the age of twenty-one years: but, in default of there being a second son of the body of my said son Thomas," then over.

The testatrix died in 1813. Her son, the tenant for life, had four sons,—the first, Christopher, was born in 1816, and died in 1822,—the second, George, was born in 1820, and died in 1827,—the third, William, was born in 1824, and attained his age of twenty-one in the lifetime of his father, whom he survived,—the fourth, Thomas, was born in 1832, and also attained twenty-one:—

Held, that George, the second born son of Thomas, the tenant for life, took a contin-

gent remainder expectant on the determination of the life-estate of his father; and consequently that, he having died under twenty-one and intestate, William became entitled to the estate as his heir-at-law. *Alexander v. Alexander*, 59

II. *Effect of Devise to an Executor, subject to a Charge*,—*Lowe v. Peskett*, 500

DILAPIDATIONS.

See COUNTY COURT, III.

DISCLAIMER.

See COPYRIGHT, II.

DOCK COMPANY.

See RAILWAY COMPANY.

DRAMATIC COPYRIGHT.

Consent in Writing of Author.

1. The Dramatic Copyright Act, 3 & 4 W. 4, c. 15, s. 2, imposes a penalty for the representation at any place of dramatic entertainment, "without the consent in writing of the author or proprietor," of any dramatic piece, the sole liberty of representing which is by s. 1 secured to such author or proprietor:—Held, that the consent need not be under the hand of the author or proprietor himself, but may be given by an agent. *Morton v. Copeland*, 517
2. In an action for penalties, the onus of proving the consent of the author or proprietor lies upon the defendant. *Ib.*
3. The plaintiff was a member of a society called The Dramatic Authors' Society. This society issued lists of the several dramas composed by its members, with the prices charged for each night's performance, if represented with the consent of the secretary, such permission to be granted conditionally on the party representing the piece furnishing a monthly file of bills, and payment within a given time after the account rendered. The latest of these lists was published in 1846. In 1849, the secretary gave the defendant a written permission in these terms,—“Mr. C. has permission to play dramas belonging to the authors forming the Dramatic Authors' Society, upon his punctual transmission of monthly bills, and payment of the prices for the performances of such dramas.” The plaintiff sued the defendant for penalties for representing three dramas composed by him since the year 1849:—

Held, that the license so given by the secretary (the authorized agent of the plaintiff for that purpose), coupled with the original list and prospectus, applied to dramas composed by members of the society after the date of the license, as well as to those composed before. *Ib.*

ECCLESIASTICAL DILAPIDATIONS.*See SIMONY.***EJECTMENT.***I. Pleadings in.*

An equitable defence, under s. 83 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, cannot be pleaded in ejectment,—there being, since the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, *no plea* in that form of action. *Neale v. Avery*, 328

II. Payment of Costs by a Stranger.

To entitle a plaintiff in ejectment to call upon parties who are strangers to the record, to pay the costs, it must be clearly shown that the defence was conducted by them for their own benefit in the name of a pauper defendant: it is not enough to show that they are interested as equitable mortgagees of part of the premises, and that they have endeavoured to make terms with the plaintiff after judgment signed. *Anstey v. Edwards*, 212

EQUITABLE ASSETS.*See EXECUTORS AND ADMINISTRATORS.***EQUITABLE DEFENCE.***See PLEADING, I.***EQUIVALENT.***See PATENT.***ERROR.***See WRIT OF ERROR.***ERROR BOOKS.***Delivery of.*

The 68th rule of Hilary Term, 1853, which requires the error books to be delivered to the judges "four clear days before the day appointed for argument," refers to the day of the actual argument, and not to the second day of term, when the judges meet to appoint the days for argument. *Parr v. Jewell*, 684

EVIDENCE.*I. Examination under 1 W. 4, c. 22.*

1. The court declined to set aside a judge's order for the *viva voce* examination of the plaintiff before issue joined, which had been made upon an affidavit merely stating that he was a master mariner, that his evidence was material and necessary, and that he was about to sail for Stettin, and was not likely to be back in time for the trial. *Braun v. Mollett*, 514

2. A commission will not be granted for the examination of witnesses in a hostile country. *Barrick v. Buba*, 492

II. Examination of Witnesses under the Common Law Procedure Act, 1854.

Practice as to *viva voce* examination of witnesses upon summons or motion under the Common Law Procedure Act, 1854, ss. 46, 48. *Cockerell v. The Van Diemen's Land Company*, 256

*And see JOINT-STOCK COMPANY.**WAT.***EXCEPTIONS.***Bill of,—See BILL OF EXCEPTIONS.***EXECUTORS AND ADMINISTRATORS.***Assets, Evidence of.*

1. Testator devised a freehold house to his son A. (whom he appointed one of his executors) charged with a sum of money, payable within twelve months after his death, to be applied in payment of debts and legacies:—Held, *equitable assets* in the hands of the executors, though not available for distribution till the expiration of the twelve months. *Lowe v. Peskett*, 500
2. A. made a promissory note, payable on demand, to his son B., and by his will devised to B. a freehold house, charged with 240*l.*, to be raised within a year after his death, and paid to his executors for the liquidation of debts and legacies; and he made B. and C. (another son) his executors. The two executors proved the will, and B. took possession of the house, and afterwards endorsed the note to D., who sued the executors thereon. To this action B. pleaded *plenè administravit*; and C. pleaded (amongst other pleas, not including *plenè administravit*), that the note was made payable to B. on demand, and that it was endorsed by B. to D. after the death of the testator, and that B. at the time of such endorsement had assets of the testator in his hands, whereby the note was satisfied. The only assets that ever came to the hands of B. consisted of the 240*l.* charged upon the house devised to him:—

Held, that the plea was not proved; for, that the allegation that B. had assets of the testator in his hands at the time of the endorsement of the note, was a material allegation, and meant *legal assets* presently available; and the 240*l.* was not *legal*, but *equitable assets*, and not available as assets until the expiration of the year. *Id.*

FIXTURES.*What removable.*

A ladder, a crane, and a bench were left by an outgoing tenant upon the demised premises at the expiration of his term; the ladder and crane were fastened with nails or screws to the floors and to the joists above, in the usual way, and the bench was fixed to the wall:—Held, that, in the absence of anything to

show that they were put up^d for purposes of ornament or trade, trover would not lie for them. *Wilde v. Waters*, 637

FORFEITURE.

See COPYHOLD, II.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GRANT.

Construction of.—See WAY.

HABEAS CORPUS.

I. Where granted.

1. A "priest in ordinary of Her Majesty's chapels royal" is privileged from arrest on process of the county court, under the 9 & 10 Vict. c. 95, s. 99, for non-attendance on a judgment summons,—such process being in the nature of execution, and not merely process of contempt. *Ex parte Dakins, In re Swan v. Dakins*, 77
2. The proper mode of obtaining his discharge in such case, is, not by writ of privilege, but by habeas corpus from one of the superior courts (upon affidavits showing his privilege), or by application to the judge of the county court. *Ib.*
3. This court has no power to grant a habeas corpus to bring up a prisoner who has been convicted at the Central Criminal Court, on the ground that the offence charged was committed at a place out of the jurisdiction of that court. *In re Francis Robert Newton*, 97
4. The proper course is, to apply to the Attorney-General for his fiat for the allowance of a writ of error coram nobis, the granting or withholding of which is matter for his discretion. *Ib.*

II. Application for, by whom made.

The court declined to allow the motion for the habeas to be made by the father of the prisoner, but required it to be made by counsel. *Ib.*

HUSBAND AND WIFE.

Dispensation with the Husband's Concurrence in a Conveyance of the Wife's Property.

The court made an order under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's property,—upon an affidavit stating, that, having fallen into distressed circumstances, the husband about two months before left England for Australia, with the intention of never returning, and that he had ever since been living separate and apart from his said wife. *In re Anne Kelsey*, 197

And see ACKNOWLEDGMENT.

INDEMNITY.

To a count upon an absolute contract by the defendant to indemnify the plaintiffs, his tenants, against the consequences of the non-payment of his rent to the superior landlord, alleging for breach, that, the rent being in arrear, the plaintiffs' goods were seized by the superior landlord,—the defendant pleaded, that, at the time of the distress, more was due from the plaintiffs to the defendant for rent, than the amount distrained for as in the declaration alleged:—Held, no answer to the action,—the payment of their rent by the plaintiffs not being a condition precedent. *Briant v. Pilcher*, 354

INDUSTRIAL SCHOOL.

See BRIGHTON MANAGEMENT ACT.

INSOLVENT DEBTOR.

Discharge of.

A discharge under the insolvent debtors act does not prevent the party being committed by a county court judge, upon a judgment-summons, under the 9 & 10 Vict. c. 95, ss. 98, 99, in respect of an unsatisfied judgment, though inserted in the schedule. *George v. Somers*, 539

INTEREST IN LAND.

See STATUTE OF FRAUDS.

ISSUE.

Changing the Venue in.—See PRACTICE, VI., 1.

JOINT-CONTRACTORS.

Liability of.

Under the 4 Anne, c. 16, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, the statute of limitations does not run till his return or death, though the others have never been absent from the kingdom. *Towns v. Mead*, 123

JOINT-STOCK COMPANY.

Evidence of Directorship.

A company was projected for the working of mines in Belgium. A prospectus was printed, describing the objects of the association, naming A., B., C., and D. as directors, and Messrs. Martin, Stone, and Co., as the bankers of the company, and stating that "the deposits would be returned in full, without any deduction for preliminary expenses, in the event of the non-prosecution of the company."

In an action by an allottee of 500 shares, to recover back, on the abandonment of the project, the 250*l.* paid by him thereon to Martin, Stone, & Co., the plaintiff, in order to show D. to have been a director, proved, that he was seen ten or twelve times at the offices

of the company, and twice in the directors' room; that he took some of the prospectuses for the purpose of circulation amongst his acquaintance; and that his name appeared, with the others, at the head of the company's account with the bankers.

The plaintiff also put in the bankers' pass-book, containing entries of receipts of cash on account of the company; but there was nothing to identify any part of it as the 250*l.* paid in by the plaintiff. The pass-book was received, as being evidence because proved to have been seen in the hands of C., one of the defendants:—

Held, that the pass-book was no evidence against D., there being no proof of the account having been opened in his name, with his consent, or subsequent acquiescence; and that there was no evidence to go to the jury that D. was a director at the time that the plaintiff paid the 250*l.* to Martin, Stone, & Co. *Drouet v. Taylor*, 671

And see RAILWAY COMPANY.

JUDGE'S ORDER.

Costs of making a judge's order a rule of court. *Crowther v. Crowther*, 177

LANDLORD AND TENANT.

I. Fixtures.

A ladder, a crane, and a bench were left by an outgoing tenant upon the demised premises at the expiration of his term; the ladder and crane were fastened with nails or screws to the floor and to the joists above, in the usual way, and the bench was fixed to the wall:—

Held, that, in the absence of anything to show that they were put up for purposes of ornament or trade, trover would not lie for them. *Wilde v. Waters*, 637

II. Dilapidations.

See COUNTY COURT, II.

LEASE.

Contract for.

1. Covenants restrictive of particular Trades.]—

Upon a negotiation between A. and B. for the grant of a lease, B., the proposed lessee, informed the agent of A. that he wanted the premises for the purpose of carrying on therein the business of a retailer of beer, and inquired whether there was anything in the original lease to restrain the tenant from carrying on such business therein; to which inquiry the agent,—being ignorant of the contents of the lease, but knowing that such trade had been carried on upon the premises for some years,—replied that there was nothing, so far as he knew, to prevent the tenant from carrying on the proposed trade. B. thereupon consented to take a lease, and a memorandum to the following effect was

drawn up, and signed by the respective parties:—

"Lease, twenty-one years from Lady Day, 1853. Taxes, &c. *Lease and counterpart to contain all usual and proper covenants, and particularly those contained in the lease under which the premises are held, so that the same in no way restricts the trade of a retailer of beer. Lessee not to require production of the lessor's title:*"—

Held, that A. duly performed his contract by being ready to grant a lease without a covenant to restrict the lessee from using the premises as a beer-shop, notwithstanding that there was such a restrictive covenant in the lease under which he himself held. *Hayward v. Parke*, 295

2. In construing a written contract, the court will, if possible, so read it as to effectuate the intention of the parties, rather than defeat it. *Stratton v. Pettit*, 420

3. By "articles of agreement" between A. and B., it was witnessed that A. agreed to let, and B. agreed to take, certain premises then in possession of B., for the term of five years; and A. also agreed to sell, and B. agreed to purchase, the fee-simple of the premises, to be conveyed to B., his heirs, &c., absolutely, at the end of the said five years, provided B., his heirs, &c., should have in the mean time quietly occupied, and not have been evicted from the premises; yielding and rendering by B. unto A., as well for the rent or use of the said premises for five years, as for the said purchase thereof, 70*l.* in and by 70 shares of 1*l.* each, in the Birkbeck Life Assurance Company, the receipt and delivery unto A. of the said shares of the value of 70*l.*, in full for the said rent and purchase, A. thereby admitted: And it was further agreed, that, should B. be legally ejected from the premises within or during the term of five years, A. should pay or refund to B., either in cash or in the said shares, at and after the rate of 7*l.* 10*s.* per annum for the portion of the term unexpired at the time of such eviction, and that A. should also indemnify B. against all loss and expense in maintaining possession. And it was further agreed that no abstract or investigation of title should be permitted or required beyond evidence of the seisin and possession as owner by A. and his ancestors for twenty-one years and upwards last past; and that B. should immediately do and execute all acts necessary to transfer and vest the said 70 shares in A.:—

Held, that the intention of the parties, to be collected from the language of the instrument, was, that it should take effect as a lease, and consequently that it was void, as such, by the 3d section of the 8 & 9 Vict. c. 106, not being by deed. *Id.*

II. Of Copyhold,—See COPYHOLD, I.

LEGAL ASSETS.

See EXECUTORS AND ADMINISTRATORS.

LETTERS PATENT.

See PATENT.

LIEN.

See ATTORNEY, II.

LIMITATION OF ACTION.

I. *Under 3 & 4 W. 4, c. 27.*

A. devised a messuage to B. and C., in trust for D. for life, and, after his death, on certain other trusts. A. died in 1815. In 1818, the plaintiff, who had married a daughter of one E., who it was assumed had been let into possession of the messuage by D., the tenant for life, succeeded E. in the possession of the premises, and remained therein, without payment of rent to or acknowledgment of title in any one, until 1854, when the heir-at-law of B., the surviving trustee (the tenant for life being dead), turned him out:—Held, that the plaintiff had, by his adverse possession for more than twenty years, acquired a title as well against the trustees as against the cestui que trust; for that, although a cestui que trust who is in possession with the consent or acquiescence of the trustees may be regarded as their tenant at will, yet, if he is only allowed to receive the rents, or otherwise deal with the property in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees who choose to allow him to act for them in the management of the estate. *Melling v. Leak*, - 652

II. *Under 4 Anne, c. 16, s. 19.*

Under the 4 Anne, c. 16, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, the statute of limitations does not run till his return or death, though the others have never been absent from the kingdom. *Towne v. Mead*, 123

LONDON SMALL DEBTS ACT.

Suggestion to deprive Plaintiff of Costs.

Upon a motion to enter a suggestion to deprive the plaintiff of costs under the London Small Debts Act, 15 & 16 Vict. c. lxxvii, s. 119, it is enough if the affidavit shows with reasonable certainty that the plaintiff and defendant did not, at the time of the commencement of the action, dwell more than twenty miles apart. *Shepherd v. Baker*, 544
And, it seems, the motion may be made at any time before the costs are taxed. *Ib.*

MANDAMUS.

To examine Witnesses in Australia.

It is not enough to entitle a plaintiff to a man-

damus to examine a witness in Australia, to show a mere probability that he can give useful evidence. *Lane v. Bagehaw*, 576

MASTER AND SERVANT.

Responsibility of Master for Acts of his Servant.

1. A master is civilly responsible for the fraud or negligence of his servant acting in the course of his employment; but not for an act of wilful fraud or negligence done by him out of the scope of his authority, or inconsistent with the course of his employment. *Coleman v. Riches*, 104
2. Therefore, where A., the servant of a wharfinger, fraudulently signed a receipt purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, to be shipped to the order of C., no such wheat having in fact been delivered, and thereby wilfully induced C. to pay the price thereof to the pretended vendor:—Held, that the wharfinger was not liable,—although it was proved that C.'s course of dealing was, to pay for all wheat delivered for him at the wharf, on the production by the vendor of the wharfinger's receipt, and that the latter knew it. *Ib.*
3. But, *semble*, that it would have been otherwise, if there had been any evidence of an understanding or agreement between C. and the wharfinger to the effect above stated. *Ib.*

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDA.

I. *Judges.*

Maule, J., resigned, 636.
Willes, J., appointed, 636.

II. *Queen's Counsel.*

C. S. Whitmore, 636.
W. Overend, 636.
P. A. Pickering, 636.
J. P. Wilde, 636.

III. *Serjeant.*

Humphry William Woolrych, f.

MINING ADVENTURERS.

See PRACTICE, VIII.

MISDIRECTION.

See NEW TRIAL, II.

NEGLIGENCE.

See CASE, II.

RAILWAY COMPANY, II.

NEW TRIAL.

I. *Where granted.*

1. The circumstance of the judge having left

an immaterial question to the jury, with a direction, that, if they find it one way, they must return a verdict for the defendant, does not entitle the plaintiff to move for a new trial, if upon all the other facts of the case the defendant is clearly entitled to the verdict.

Clarke v. Arden, 227

2. A cause was tried before Lord Truro when Chief Justice of this court, and a bill of exceptions tendered, and the draft thereof submitted to his Lordship; but, in consequence of his elevation to the woolsack, and subsequent illness, all hope of getting it settled and sealed being at an end,—the court directed a new trial. *Bennett v. The Peninsula and Oriental Steamboat Company*, 29

II. Misdirection.

Upon an appeal from the decision of a county court, in an action for dilapidations, the case, without saying what the evidence was, stated that the judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises, with the particulars in their hands, and would therefore be able to judge whether and to what extent the plaintiff had made out his case:—The court directed a new trial. *Smith, App., Douglas, Resp.*, 31

ORDER.

See JUDGE'S ORDER.

OUTLAWRY.

Setting aside.

A rule to set aside proceedings to outlawry, for irregularity, was discharged *with costs*, on the ground that the affidavit did not purport to be made by an attorney duly authorized by the defendant. The irregularity being admitted, the defendant, although he had not paid the costs of the former motion, was allowed to make a second application for the same purpose,—but *only on payment of the costs of the second rule*. *Skinner v. Carter*, 548

PAROCHIAL SCHOOL.

See BRIGHTON MANAGEMENT ACT.

PARTNERS.

Liability of.

Under the 4 Anne, c. 16, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, the statute of limitations does not run till his return or death, though the others have never been absent from the kingdom. *Towns v. Mead*, 123

PATENT.

Infringement of.

The plaintiff below obtained letters-patent for "improvements in the manufacture of iron and steel." In his specification, he declared his invention to be (amongst other things), "the use of carburet of manganese in any process whereby iron is converted into cast-steel;" and he described the process which he claimed thus:—"I do it, by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." He then stated that he did not claim the use of the mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention, but only the use of "carburet of manganese, in any process for converting iron into cast-steel."

The defendant below produced the same result,—a superior and more valuable description and quality of cast-steel,—as certainly, and more cheaply, by substituting for the carburet of manganese, its elements, viz., *oxide of manganese and coal-tar*, which, being put into the crucible with the iron, according to the evidence of chemists, would form "carburet of manganese" before the iron was in a state of fusion, and consequently before any combination therewith could take place.—

The judge told the jury that there was no evidence of infringement:—

Held,—reversing the judgment of the Exchequer Chamber, and contrary to the opinions of the majority of the common law judges,—that the ruling of the learned judge at the trial was correct. *Unwin v. Heath*, 713

PIRACY.

See COPYRIGHT.

PLEADING.

I. *Equitable Defence.*

An equitable defence, under s. 83 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, cannot be pleaded in ejectment,—there being, since the Common Law Procedure Act, 1862, 15 & 16 Vict. c. 76, *no plea* in that form of action. *Neale v. Avery*, 328

And see PRACTICE.

II. *Simoniack Contract*,—See SIMONY.

III. *Constructing Pleadings Distributively.*

The 75th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, in effect extends the doctrine of *Cousins v. Paddon*, 2 C. M. & R. 547,† to all descriptions of pleas. *Parr v. Jewell*, 634

IV. *Pleading several Matters.*—See PRACTICE, IV.

V. *Condition Precedent.*

By a contract made between the Eastern Counties Railway Company and the defendants, it was, amongst other things, provided, that the defendants should supply and the company should purchase, subject to the terms and to the extent thereafter mentioned, *all* the coke that should be required by the company for working their railways between London and Cambridge and London and Colchester. By the fourth clause, the company engaged to take from the defendants 550 tons and 100 tons of coke weekly during the period of seventeen years; and they further agreed, that, if they should require *more* than those quantities for the working of their railways, they would take the same from the defendants,—with a proviso, that, if they should require *less* than the stipulated quantities, the supply should be reduced accordingly, upon their giving the defendants three months' notice. And, by the eleventh clause, the company engaged, that, "so long as the defendants should punctually and duly supply *the said coke*, and so long as the same should be of the best quality, they would abstain from making purchases of coke for their lines of railway aforesaid, from any other persons:"—

Held, that the readiness and willingness of the company to take from the defendants *all* the coke they required for the purpose of their railways, was not a condition precedent to their right to insist upon being supplied with the quantities expressly stipulated for; and, consequently, that the fact of the company having bought coke from other persons afforded no answer to an action by them against the defendants for a failure to deliver the quantities contracted for. *Eastern Counties Railway Company v. Philpott*, 2

POSTEA.

Amendment of,—See COSTS, I., 1.

PRACTICE.

I. *Particulars of Demand.*

Upon an appeal from the decision of a county court, in an action for dilapidations, the case, without saying what the evidence was, stated that the judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises, with the particulars in their hands, and would therefore be able to judge whether and to what extent the plaintiff had made out his case:—The court directed a new trial. *Smith, App., Douglas, Resp.*, 31

II. *Judge's Order.*

Costs of making a judge's order a rule of court. *Crowther v. Crowther*, 177

III. *Rule for Special Jury.*

Where a rule for a special jury (obtained in due time) has been obtained for delay, the proper application to the court, is, for a rule to show cause why the cause should not be tried by a special jury, in its order, at the sitting for which the notice was given, if the defendant shall then have one in attendance, and, in default thereof, then that the cause be tried by a common jury. *Gray v. Knight*, 143

IV. *Leave to plead several Matters.*

In detinue for a lease, the court allowed the defendants, upon a rule to plead several matters, to plead, in addition to a denial of the detainer, the following pleas:—

1. That the plaintiff sued the defendants for the detention of the lease, and recovered judgment, in a former action, and issued execution, and took other proceedings to enforce the judgment, that the sum of 150*l.*, to secure which the lease was deposited, was still due, and that no tender of that sum had been made since the judgment in the said former action, nor had any demand of the lease been made after the termination of the proceedings in the said former action:

2. *For a defence on equitable grounds*, as to the detention of the lease,—that it was deposited to secure payment to the defendants of 150*l.* and interest, by way of equitable mortgage, upon the terms of an agreement in writing,—the former recovery, and proceedings thereon,—that the 150*l.* was still due,—that, after the commencement of this action, the defendants tendered and offered to deliver up the lease to the plaintiff upon payment of the 150*l.*, and the defendants also tendered and offered the plaintiff his costs of this action up to that time,—and that such tender and offer were refused. *Chilton v. Carrington*, 206

V. *Withdrawing a Juror.*—See ATTORNEY, II.

VI. *Changing the Venue.*

1. In the case of an issue, it is no objection to an application to change the venue from Middlesex to Sussex, that the plaintiff is an attorney of the court. *Robertson v. Hayne*, 560
2. The venue will be changed where convenience manifestly requires it. *Id.*
3. Where a plaintiff is entitled to amend his declaration by changing the venue, as a matter of right, the court will not, at the instance of the defendant, impose terms. *Turnley v. The London and North-Western Railway Company*, 575

VII. *Striking out the Names of Plaintiffs.*—Post, VIII., 1.

VIII. *Time for moving.*

1. *To set aside a Judge's Order.*—An action having been brought in the names of twelve persons who had formerly been shareholders and adventurers in a mine, upon instructions given to the attorney by one who alleged himself to be pursuer of the mine, and as such authorized to sue on behalf of the adventurers, three of the plaintiffs obtained judges' orders to strike out their names, on the ground that they had no interest in the matter, and that their names had been used without their knowledge or consent.

These orders were obtained on the 19th of September, 1854,—after the cause had been taken down for trial, and the defendant had consequently become entitled to costs of the day, on the withdrawal of the record.

On the 5th of May, 1855 (three days only before the end of Easter Term), the defendant obtained a rule calling upon the three plaintiffs whose names had been struck out to show cause why the orders for that purpose should not be rescinded, and upon the attorney to show cause why he should not pay the costs already incurred, and give security for the future costs:—

Held, that the application was too late for either purpose. *Collins v. Johnson*, 588

2. *For Suggestion.*—It seems that a motion for a suggestion may be made at any time before the costs are taxed. *Shepherd v. Baker*, 544

IX. *Affidavits in Answer to "New Matter."*

Practice as to allowing affidavits in answer to "new matter" upon motions, under 17 & 18 Vict. c. 125, s. 45. *Wood v. Coz*, 424; *Hayne v. Robertson*, 554

PRIEST.

In Ordinary of Chapels Royal.—See PRIVILEGE.

PRINCIPAL AND AGENT.

See MASTER AND SERVANT.

PRIVILEGE.

Queen's Household.

- A "priest in ordinary of Her Majesty's chapels royal" is privileged from arrest on process of the county court, under the 9 & 10 Vict. c. 95, s. 99, for non-attendance on a judgment summons,—such process being in the nature of execution, and not merely process of contempt. *Ex parte Dakins, In re Swan v. Dakins*, 77

The proper mode of obtaining his discharge in such case, is, not by writ of privilege, but by habeas corpus from one of the superior courts (upon affidavits showing his privilege), or by application to the judge of the county court.

And see ATTORNEY, I.

PROMOTIONS.

See MEMORANDA.

PROSPECTUS.

Issuing by Public Company before Complete Registration.—See RAILWAY COMPANY, I.

PUBLIC COMPANY.

See RAILWAY COMPANY.

PUBLIC WAY.

See WAY.

PURSER.

Of a Mine, Authority of.—See ATTORNEY, III.

RAILWAY COMPANY.

I. *Contracts by.*

The 24th section of the 7 & 8 Vict. c. 110, which imposes a penalty upon the promoters of an intended company for entering into contracts for and in the name of the intended company before obtaining a certificate of provisional registration,—and the 7th section of the 10 & 11 Vict. c. 78 (an act to amend the former), which imposes a penalty upon the promoters for issuing before complete registration, any prospectus, &c., containing statements at variance with the particulars returned to the registrar of joint-stock companies under the former act,—are both applicable to railway companies requiring an act of parliament. *Abbot v. Rogers*, 277

II. *Negligence.*

1. Where work is done for a railway company under a contract (parol or otherwise), the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done. *Steel v. South-Eastern Railroad Company*, 550
2. In an action against a railway company for negligence in the management of their railway at one of their stations, whereby the plaintiff a passenger, was injured,—the defence relied on by the defendants' counsel was, that the accident arose entirely from the plaintiff's own want of caution, and that the company were wholly blameless. The evidence showed that the plaintiff arrived at the station about two minutes or less before the time of departure of the train, and that, in running along the line, at a place where he ought not to have gone, in order to reach the train, which was some distance ahead on the opposite side of the railway, he fell over a switch-handle, and was considerably hurt. The judge left it to the jury to say whether the injury to the plaintiff was occasioned by the negligence and want of proper care of the de-

endants, or resulted entirely from the plaintiff's own carelessness, as the company contended. The jury having found for the plaintiff:—

Held, that the judge was, under the circumstances, warranted in leaving the case to the jury upon the only points raised by the parties; and that the omission to call their attention to the intermediate case of the negligence of both parties being contributory to the accident, was no misdirection. *Martin v. The Great Northern Railway Company*, 179

3. *Quere*, whether the doctrine of contribution is applicable to a case of this sort,—of tort founded upon contract. *Ib.*

III. Liability for Loss of Passenger's Luggage.

The plaintiff, a passenger by railway, brought with him into the carriage a carpet-bag, containing a large sum of money, and kept it in his own possession until the arrival of the train at the London terminus. On alighting from the carriage with the bag in his hand, the plaintiff permitted a porter of the company to take it from him for the purpose of securing for him a cab. The porter, having found a cab (within the station), placed the carpet bag on the foot-board thereof, and then returned to the platform to get some other luggage belonging to the plaintiff, when the cab disappeared, and the carpet-bag and its contents were lost:—Held, that this was a loss by the negligence of the company, for which they were responsible in damages. *Butcher v. The London and South-Western Railway Company*, 13

IV. Misdelivery of Goods.

The plaintiff, a provision merchant at Morlaix, sent 314 casks of butter by the defendant's railway, marked A., and addressed "to order, at Brewer's Quay." The defendants, concluding from the fact of their having been in the habit of carrying butters similarly marked consigned to Messrs. A. & A., factors, in London, that these butters were intended for them, and having received directions from A. & A. to send all butters coming to them from Morlaix to Hibernia Wharf, delivered 154 of the casks at that place,—the remaining 160 having by accident got to Brewer's Quay.

C. & Co., the holders of the bill of lading, had received directions not to let A. & A. have the butters unless they accepted certain drafts at sight, which they declined to do; and, when C. & Co. applied to the defendants for information as to the 154 casks, they referred them to A. & A., and took no further notice of the transaction.

A. & A. afterwards sold the butters at the fair market price of the day, and rendered account-sales to the plaintiff; but, before the money was handed over, they suspended payment:—

Held, that the defendants were liable to the plaintiff for this mis-delivery, notwithstanding he had so far adopted the acts of A. & A. as to endeavour to obtain from them the proceeds of the sale; and that the proper measure of damages, was, the net amount for which the butters had been sold. *Sanquer v. The London and South-Western Railway Company*, 163

V. Case for Accidental Injuries, under Lord Campbell's Act

In an action against a railway company under Lord Campbell's Act, 9 & 10 Vict. c. 93, the presiding judge intimating a strong opinion that the defendants were not liable, and the company being willing to give the plaintiff 150*l.* without admitting a liability on their part, it was agreed between the counsel that a juror should be withdrawn, and nothing more was done:—

Semble, that the court could not, under the circumstances, give effect to the plaintiff's attorney's claim of lien. *Stretton v. The London and North-Western Railway Company*, 40

RECOGNISANCE.

See BAIL.

REMAINDER.

Contingent,—See DEVISE.

RIGHT OF WAY.

See WAY.

SALE.

Of Goods.

1. The defendant, by bought and sold note, contracted to sell to the plaintiff "about 500 tons nitrate of soda, in bags, of good merchantable quality," to be ready for delivery by a given day, at a certain price and upon certain terms and conditions. The contract then proceeded,—“It is understood that the above nitrate of soda, is to form the full and complete cargo of the *John Phillips*, 345 tons register, now on her passage to Sydney, to proceed thence without undue delay to the west coast of South America, there to load the above. In the unexpected event of the *John Phillips* getting ashore, or being unable to prosecute her voyage, from any casualties of the sea, then the seller agrees to deliver, and the buyer agrees to take, in lieu thereof, another cargo or cargoes of about equal quantity, to be named at the earliest practicable period prior to arrival off the coast. The only ground on which the seller is to be excused delivery of the above nitrate of soda, is, the loss of the said vessel (or that which may be substituted for it) on her homeward

voyage; in which case this contract is to be considered void, but in no other event what-
ever:”—

- Held, that this was an absolute contract for the sale of 500 tons (more or less), and not of a quantity limited by the capacity of the vessel named: though *semble* (*per* Maule, J.), that the incapacity of the John Phillips to carry the whole 500 tons would excuse the seller from bringing it all home by that vessel. *Bourne v. Seymour*, 337
2. Held also, that the contract did not amount to a warranty that the John Phillips should be of capacity to carry the whole 500 tons. *Ib.*

SECURITY FOR COSTS.

See ATTORNEY, III.

SCHOOL.

See BRIGHTON MANAGEMENT ACT.

SIMONY.

I. What amounts to a Simoniactal Contract.

To a declaration by A., an incoming, against B., an outgoing incumbent, for dilapidations to the rectory house and premises, B. pleaded, that A., being rector of C., and B. incumbent of D., it was agreed between them, with the consent of their respective patrons and diocesans, that they should exchange their respective livings, and “that A. should not call upon B. to pay for the repairs in the declaration mentioned, or for any or either of them:”—

Held, upon motion for judgment non obstante veredicto on this plea, that it did not necessarily disclose a simoniactal contract. *Goldham v. Edwards*, 437

II. How pleaded.

Held also, that, in pleading a simoniactal contract under the 31 Eliz. c. 6, s. 8, it need not be alleged that the agreement was made corruptly; but that it is enough if the circumstances disclosed by the plea necessarily show that the agreement was corrupt and contrary to the statute. *Goldham v. Edwards*, 437

SPECIAL JURY.

Delay.

Where a rule for a special jury (obtained in due time) has been obtained for delay, the proper application to the court, is, for a rule to show cause why the cause should not be tried by a special jury, in its order, at the sitting for which the notice was given, if the defendant shall then have one in attendance, and, in default thereof, then that the cause be tried by a common jury. *Gray v. Knight*, 143

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTE OF FRAUDS.

Interest in Land.

Commissioners for a local improvement were incorporated by act of parliament, and empowered to borrow money on mortgage of the lands or funds acquired by them by virtue of the acts, or on bond. By a subsequent act, which provided a form of bond, it was recited, “that the commissioners had, pursuant to a power in that behalf contained in one of their acts, executed an indenture dated the 26th of May, 1852, for securing the performance of the condition of certain bonds granted pursuant to a deed of settlement of even date therewith, and therein referred to.” The form of bond given by the act contained the following provisoes:—“Provided always, that the lands, tenements, money, property, and effects of the said commissioners, acquired and to be acquired under or for the purposes of the said acts, or any of them, shall alone be answerable to pay and satisfy the principal sum and interest secured by the above-written bond, and that no commissioner or other person shall in any case be personally liable to pay the same principal and interest, or any part thereof: provided also, that the above-written bond is granted by the commissioners to the intent that it may be entitled to the benefit of an indenture of mortgage dated the 26th of May, 1852, executed by the said commissioners under the authority of the above-mentioned acts, and may be subject to the powers and provisions of an indenture of settlement of the same date, referred to in the said indenture of mortgage:”—

Held, that these bonds conferred upon the holder an interest in land within the meaning of the 4th section of the Statute of Frauds. *Toppin v. Lomas*, 145

SUB-CONTRACTOR.

Negligence by.

Where work is done for a railway company under a contract (parol or otherwise), the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done. *Steel v. South-Eastern Railway Company*, 650

SUGGESTION.

See LONDON SMALL DEBTS ACT.

TENANT AT WILL

See TRUSTEE.

THEATRICAL PERFORMANCE.

See DRAMATIC COPYRIGHT.

TROVER.

For Pictures.

A ladder, a crane, and a bench were left by an outgoing tenant upon the demised premises at the expiration of his term; the ladder and crane were fastened with nails or screws to the floor and to the joists above, in the usual way, and the bench was fixed to the wall:—

Held, that, in the absence of anything to show that they were put up for purposes of ornament or trade, trover would not lie for them. *Wilde v. Waters*, 637

TRUSTEE.

A. devised a message to B. and C., in trust for D. for life, and, after his death, on certain other trusts. A. died in 1815. In 1818, the plaintiff, who had married a daughter of one E., who it was assumed had been let into possession of the message by D., the tenant for life, succeeded E. in the possession of the premises, and remained therein, without payment of rent to or acknowledgment of title in any one, until 1854, when the heir-at-law of B., the surviving trustee (the tenant for life being dead), turned him out:—Held, that the plaintiff had, by his adverse possession for more than twenty years, acquired a title as well against the trustees as against the cestui que trust; for that, although a cestui que trust who is in possession with the consent or acquiescence of the trustees may be regarded as their tenant at will, yet, if he is only allowed to receive the rents, or otherwise deal with the property in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees who choose to allow him to act for them in the management of the estate. *Melling v. Leak*, 652

VENUE.

Changing.

1. In the case of an issue, it is no objection to an application to change the venue from Middlesex to Sussex, that the plaintiff is an attorney of the court. *Robertson v. Hayne*, 560
2. The venue will be changed where convenience manifestly requires it. *Id.*
3. Where a plaintiff is entitled to amend his declaration by changing the venue, as a matter of right, the court will not, at the instance of the defendant, impose terms. *Turnley v. The London and North-Western Railway Company*, 575

WARRANTY.

See CONTRACT.

WAY.

Grant of.

1. The plaintiffs and the defendant each purchased lands of one W., which were separated by a road over which a right of way was reserved to each (the freehold remaining in W.), with a joint obligation to repair it.

In the conveyance to the plaintiffs, the land purchased by them was described as containing, thirty-one acres or thereabouts, "which with the abutments and boundaries thereof were more particularly described in the map or plan thereof affixed to and forming part of the indenture, together with full and free liberty, licence, and authority for the said company (the plaintiffs) their successors and assigns and tenants, and all persons coming to or going from the same land and hereditaments, or any part thereof, to use and enjoy, with horses, carts, and carriages, or on foot, jointly or in common with others the person or persons for the time being entitled to the like liberties, licenses, and authorities respectively, the roads or way leading to and from the same lands and hereditaments, as the same roads or ways are described in the said map or plan."

At the time of the conveyance, the land so purchased by the plaintiffs was separated from the road by a hedge in which were two gates, one at the upper, the other at the lower end of the road. The plaintiffs removed the hedge, and built a wall with two gates therein, both at some distance from the spot where the old gates stood.

The defendant obstructed the access to these new gates, by excavating the road to the depth of between four and five feet:—

Held, that the defendant was liable to an action at the suit of the plaintiffs; for that, whether they were justified in altering the position of the gates or not, they were still entitled to the uninterrupted use of the way as granted to them. *South Metropolitan Cemetery Company v. Eden*, 42

2. But, *semble*, that the grant was a general grant of a right of way along the road and every part thereof, and was not limited to a way through the old gates. *Id.*
3. In an action for an injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured,—the evidence was, that many persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from a street to the main road, by avoiding an angle; but that the owner of the premises, as often as he saw them, turned them back:—Held, no evidence to go to the jury of a "public way." *Stone v. Jackson*, 199

798 WESTMINSTER BONDS.

WRIT OF PRIVILEGE.

WESTMINSTER IMPROVEMENT BONDS.

Interest in Land.

Commissioners for a local improvement were incorporated by act of parliament, and empowered to borrow money on mortgage of the lands or funds acquired by them by virtue of the acts, or on bond. By a subsequent act, which provided a form of bond, it was recited, "that the commissioners had, pursuant to a power in that behalf contained in one of their acts, executed an indenture dated the 26th of May, 1852, for securing the performance of the condition of certain bonds granted pursuant to a deed of settlement of even date therewith, and therein referred to." The form of bond given by the act contained the following provisos:—"Provided always, that the lands, tenements, money, property, and effects of the said commissioners, acquired and to be acquired under or for the purposes of the said acts, or any of them, shall alone be answerable to pay and satisfy the principal sum and interest secured by the above-written bond, and that no commissioner or other person shall in any case be personally liable to pay the same principal and interest, or any part thereof: provided also, that the above-written bond is granted by the commissioners to the intent that it may be entitled to the benefit of an indenture of mortgage dated the 26th of May, 1852, executed by the said commissioners under the authority of the above-mentioned acts, and may be subject to the powers and provisions of an indenture of settlement of the same date, referred to in the said indenture of mortgage:"—

Held, that these bonds conferred upon the holder an interest in land within the meaning of the 4th section of the Statute of Frauds.
Toppin v. Lomas, 145

WILL.

See DEVISE.

WITNESS.

I. *Examination of.*

1. *Mandamus.*]—It is not enough to entitle a plaintiff to a mandamus to examine a witness in Australia, to show a mere probability that he can give useful evidence. *Lane v. Bagehow,* 576
2. *Vidâ voce.*]—The court declined to set aside a judge's order for the *vidâ voce* examination of the plaintiff before issues joined, which had been made upon an affidavit merely stating that he was a master mariner, that his evidence was material and necessary, and that he was about to sail for Stettin, and was not likely to be back in time for the trial. *Braus v. Mollett,* 514
3. *Commission.*]—A commission will not be granted for the examination of witnesses in a hostile country. *Barrick v. Buba,* 492

II. *Attendance at the Assizes.*—*See Coers.*

WRIT OF ERROR.

Error Coram Nobis.

This court has no power to grant a habeas corpus to bring up a prisoner who has been convicted at the Central Criminal Court, on the ground that the offence charged was committed at a place out of the jurisdiction of that court. The proper course is, to apply to the Attorney General for his fiat for the allowance of a writ of error coram nobis, the granting or withholding of which is matter for his discretion. *In re Newton,* 97

WRIT OF PRIVILEGE.

See PRIVILEGE.

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